

The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering

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I. INTRODUCTION

In this era of renewed interest in law school curricular reform,¹ we believe it is time to rethink the role that “ADR”² instruction and faculty ought to play in educating our students to be good lawyers. As we embark on this project, we take for granted that a significant purpose of law schools is to educate law students to be lawyers, although we recognize that some adopt an alternative philosophy regarding the purpose of legal education.³

¹ See *infra* Part II.B.

² We use the term “ADR” in this article with some reluctance because neither of us are fans of the phrase “alternative dispute resolution.” Instead, we both generally prefer using the phrase “dispute resolution” to encompass a wide range of dispute resolution methods including litigation. The term ADR gives the false impression that litigation is the norm and all other forms of dispute resolution are unusual. Also, grouping all non-litigation approaches together under one rubric is problematic because mediation and arbitration, just to name two processes, differ tremendously from one another. See John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 620–21 n.1 (2007); Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term “ADR” Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 98. Nonetheless, the phrase remains useful as shorthand for non-litigation processes and for certain kinds of courses and research.

³ See generally JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 257–85 (Lawbook Exchange 2007) (1950) (comparing modes of legal education that treat law as part of a liberal education to those oriented to the practice of law); see also ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (Lawbook Exchange 2001) (1983) (discussing evolution of law school education); Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707, 719–26 (1996) (providing a brief history of legal education in the United States).

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We reach three primary conclusions regarding how ADR faculty and instruction can help law students become better lawyers. First, and no doubt unsurprising given our backgrounds, we conclude that law schools ought to provide students with more ADR instruction. Second, and perhaps less obvious, we urge that it is even more important to better integrate ADR instruction throughout the curriculum than it is to simply provide more ADR instruction. As we will explain, it is critically important to show students how ADR fits with other aspects of lawyering, and to correct the misconception of many lawyers, clients, and even some law professors who believe that they can or should choose between ADR and litigation on an either/or basis. Third, and related, we urge that a major purpose of ADR education ought to be to help students be better lawyers for their clients. Given the realities of contemporary legal practice, ADR instruction is an essential element in teaching students about what it means to be a lawyer. Thus, ADR faculty should seek to join with, rather than be largely independent of, other faculty who teach lawyering from a more litigation-focused perspective.

In essence, we focus on what we see as the current poor coordination (or even sometimes antipathy) between “doctrinal,”⁴ “litigation-skills,”⁵ “transactional-skills,”⁶ and ADR⁷ faculty.⁸ We urge greater coordination and

⁴ Doctrinal courses focus on teaching legal rules and analysis in particular subject areas such as contracts, torts, corporations, and taxation, among many others. Sometimes people refer to these courses as “substantive” courses (typically as opposed to procedural or skills courses), but we avoid this term because it implies that other courses are not substantive—an idea we reject.

⁵ We have in mind courses such as trial practice, pretrial litigation, and appellate advocacy. Legal writing is often, but not necessarily, taught with an emphasis on litigation. Similarly, some, but not all, clinics have a litigation orientation. Courses such as interviewing and counseling could either be categorized as litigation skills or ADR.

⁶ This is the smallest of our categories. Some schools teach courses on subjects such as the drafting of contracts, leases, or articles of incorporation.

⁷ We put courses such as mediation, negotiation, and arbitration in this category.

⁸ We know these categories are not always clear in practice, and that questions can be raised as to whether a particular course, such as evidence, belongs in one category or another. The precise categorization—either as to what categories are included and what courses fit within each category—is not critical to our arguments, however. To some extent, these categories may reflect schools’ formal personnel categories, with separate statuses and procedures for clinical and/or legal writing faculty. More generally, faculty will self-identify with one of these categories, even if they sometimes teach courses in more than one category. We do not seek to defend the clarity of these categories but rather to point out that faculties sometimes divide themselves into these or perhaps other similar categories. We use these categories for simplicity and because most faculty can readily relate to them.

understanding between all these groups in recognition that everyone's shared goal ought to be to help students prepare for the various roles that good lawyers undertake. Such coordination can be very helpful both in improving the quality of teaching and in planning a desirable curriculum.

Many law professors make most decisions about their teaching quite independently, with little interaction with other faculty in their school. Individual faculty, who typically have extremely broad discretion about how to teach their courses, sometimes take the initiative to coordinate their plans with colleagues teaching "neighboring" sections or courses;⁹ but beyond that, many faculty do not coordinate their plans with other faculty. Such independence is quite understandable both because expert faculty may not feel the need to consult and because consultation with others takes time. Faculty often feel pressed for time given all their various commitments and particularly given the high priority that most schools place on scholarship relative to teaching.

In addition, to the extent they consult at all, faculty may be more likely to coordinate with colleagues teaching within their same category rather than across categories.¹⁰ While it is not surprising that faculty teaching courses in different categories would not consult with each other about those courses, we lament the lost opportunity. Foreseeably, lack of communication can lead to misunderstanding, lack of appreciation for others' insights, and missed occasions for improved overall instruction.

We believe ADR faculty can play a pivotal role in enhancing an integrated legal education that will do a better job of teaching lawyering. First, providing ADR instruction fills some gaps repeatedly identified in critiques of legal education. ADR faculty can both provide instruction in their own courses and also offer assistance to colleagues interested in incorporating ADR lessons in other courses. Second, ADR faculty often use a variety of effective pedagogical techniques that could be used more in

⁹ When teaching multi-section courses, faculty often consult with the others teaching different sections of the same course. Similarly, faculty may consult with colleagues teaching in "neighboring" areas of doctrine. For example, when one course is a prerequisite for another course, faculty of these courses may consult with each other to determine which course will cover particular topics. In addition to courses sharing what might be considered these "vertical" boundaries, faculty teaching courses sharing "horizontal" boundaries similarly might coordinate with each other. Thus, contracts and property professors might consult with each other about topics that could be covered in either course.

¹⁰ For example, faculty teaching neighboring areas of doctrine are likely to consult with each other as are litigation skills faculty teaching legal writing and pretrial practice as well as ADR faculty teaching negotiation and mediation courses.

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doctrinal and litigation skills courses. Third, many ADR faculty have mediation and consensus-building skills that could be used to promote more effective coordination among faculty in general.

Law schools should not merely make sure that all law graduates understand the differences between negotiation, mediation, arbitration, and litigation (though this is surely desirable), but should also do a better job of enhancing *all the knowledge and skills* that attorneys need to be effective. For example, law schools should teach students such insights as: facts are often contested, some disputes are not best resolved through litigation, not all disputes boil down to money, emotions should not necessarily be ignored, and other disciplines can be very helpful to attorneys. Lawyers must be able to understand parties' interests, communicate effectively, and develop options that may be acceptable to disputing parties. Moreover, the curriculum should teach these lessons not only in a few elective skills courses but also as an integral part of core doctrinal courses. In other words, law schools should *generally* convey a broader and more realistic conception of what it means to "think like a lawyer"—"and act like a lawyer"—in practice. ADR instruction, explicitly or implicitly, raises fundamental issues about lawyers' identity and roles. Thus, ADR instruction is an important corrective to a legal curriculum which routinely conveys erroneous assumptions about what it means to be a lawyer when virtually the only dispute resolution process considered is litigation.

The academic disciplines accompanying the growth of ADR offer substantial insights that can not only enlighten future lawyers as to the nature of negotiation and mediation, but also help improve the teaching of lawyering more generally. ADR courses often draw on knowledge from multiple disciplines such as economics, game theory, psychology, and sociology. In addition, ADR faculty often use a variety of pedagogical techniques that promote student engagement such as exercises, case simulations, small group discussions, and debriefing experiential learning. By drawing upon pedagogical insights from ADR instruction to enrich law school courses throughout the curriculum, law schools can greatly improve the teaching of tomorrow's attorneys.

To be effective, attorneys must be more than legal analysts and litigation advocates, considering that less than five percent of filed cases go to trial in many jurisdictions,¹¹ and that many tasks which lawyers work on do not even

¹¹ See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (describing general trend of reduction in trial rates).

result in the filing of litigation.¹² Lawyers need to understand their clients' interests, tailor the dispute resolution process accordingly, and often resolve matters through negotiation, mediation, or arbitration. To be effective in negotiation and mediation, for example, attorneys cannot rely merely on their abilities to make legal arguments and interpret cases and statutes. Transactional lawyers often include dispute resolution provisions to handle disputes that might arise from the transactions.

In addition, ADR faculty who have training or experience in mediation may be able to help colleagues better coordinate informally. Mediation skills can be helpful in managing formal processes such as the deliberations of curriculum committees, ABA and American Association of Law Schools self-study committees, and general faculty meetings. These formal processes may establish curricular policies, which obviously can be important. However, because of instructors' wide discretion, the reach of formal policy decisions is limited. Thus, faculty coordination is likely to be effective only when it is voluntary and when professors believe such coordination would be useful and reasonably efficient. ADR faculty may help their colleagues achieve these goals.

Although we believe that ADR faculty can make an important contribution to advancing legal education, this is not to suggest that ADR should be the central focus. Obviously, instruction in legal doctrine and analysis will always play the predominant role in law schools. This Article recommends incremental increases in ADR instruction and, at least as important, greater integration of instruction of legal doctrine and reasoning, litigation skills, transactional skills, and ADR. This integration should move in multiple directions. ADR teachers may need to integrate some additional doctrine, litigation skills and transactional concepts into their courses, just as professors in the other areas need to integrate more ADR.

We recognize the substantial barriers to achieving curricular reform and propose what we believe are relatively modest and feasible reforms that interested faculty and law schools can achieve without investing substantial

¹² Lawyers often spend time interviewing and counseling clients where transactions rather than disputes are at issue. See generally Bruce A. Green & Russell G. Pearce, "Public Service Must Begin at Home": *The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1212 (2009) (discussing "the lawyer's role as client counselor in the daily private practice of law, regardless of whether the matter relates to a transaction or to litigation"). Also, even when disputes are involved, lawyers and clients often decide that litigation is not warranted or try to resolve the dispute prior to filing suit. See Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 163-64 (1986) (showing that the vast majority of lawsuits are settled without trial).

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additional resources. Our proposals are not intended as a comprehensive package to be implemented on an all-or-nothing basis. Rather, these proposals are offered as a menu, to be selected by individual faculty and schools based on their particular interests, strengths, and constraints.

This Article is intended to contribute to the extensive legal education literature in two ways. First, it highlights the special contributions that ADR can provide to legal education more generally. Second, it provides a convenient catalog of some critical problems with legal education and potential solutions. This Article does not, however, attempt to offer a comprehensive analysis of all problems or potential solutions in legal education. To the extent the Article builds on excellent work done by others, it briefly summarizes that work rather than repeating prior analyses in detail.

In Part II, we examine existing common law school curricula and discuss why we believe they ought to be revised to better train future lawyers for what they will, and even more importantly, should be doing as attorneys.¹³ Part III takes a sober look at the hurdles reformers face when trying to make significant changes in law school curricula.¹⁴ We hope that better awareness of these hurdles will help us surmount the challenges. Part IV offers concrete suggestions for how, despite the constraints described in Part III, law schools can realistically improve their curricula so their graduates will be better prepared for the real world of lawyering.¹⁵ This Part will focus particularly on benefits that ADR faculty can offer in improving legal education. Part V is the conclusion.

II. PROBLEMS WITH EXISTING LAW SCHOOL CURRICULA¹⁶

A. *The Legacy of Christopher Columbus Langdell*

Anyone reading this article is likely quite familiar with the traditional and typical law school curriculum, so we will not belabor this discussion. Most law school courses focus on the analysis of appellate cases in a particular subject area. Students, often in large classes, read these cases and

¹³ See *infra* Part II.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Part IV.

¹⁶ This part provides a brief summary of problems with legal education. For more detailed discussion, see ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 11–37 (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 56–59 (2007) (referred to as the “Carnegie Report”); John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-first Century*, 34 WM. MITCHELL L. REV. 303, 333–63 (2007).

then discuss and critique their rationales in class. Students learn how to search for the holdings of cases and to make analogies and distinctions between cases. Often, professors use a Socratic method (or some variation) that encourages students to identify general legal principles rather than to simply memorize or learn rules conveyed by the professor.

This focus on legal reasoning traces its roots to Christopher Columbus Langdell, professor and dean at Harvard Law School in the latter part of the nineteenth century.¹⁷ A revolutionary of sorts in his day, Langdell moved legal education away from the old apprentice model and introduced the concept that law was a science that could best be learned by treating cases as specimens and studying their unique and common characteristics.¹⁸ He emphasized the rule-based aspects of lawyering and tried to strip out “irrelevant” emotion together with other distractions.¹⁹

Most law schools’ first year curriculum also owes a great debt to Langdell. He thought that law students should start their education with courses in civil procedure (pleading), torts, contracts, property, and criminal

¹⁷ JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 9-17 (1914); *see also* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 466-68 (3d ed. 2005) (discussing the rise of law schools); HURST, *supra* note 3, at 86 (discussing Langdell’s emphasis on the case method).

¹⁸ Langdell stated: “Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer. . . .” REDLICH, *supra* note 17, at 11 (emphasis omitted) (quoting C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871)). For further discussion of Langdell’s perspectives, *see* William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 207 (1996) (“Langdell segregated legal education from lawyers and the practice of the law.”); *see also* FRIEDMAN, *supra* note 17, at 468

At Langdell’s Harvard, the classroom tone was profoundly altered. There was no lecturer up front, expounding ‘the law’ from received texts. Now the teacher was a Socratic guide, taking the student by the hand and leading him to understand the concepts and principles hidden inside the cases. The teacher, through study of a series of ‘correct’ cases over time, showed how these concepts developed, how they grew and unfolded, like a rose from its bud.

But see STEVENS, *supra* note 3, at 3-4, 36 (arguing that Litchfield began teaching “law ‘as a science’” in 1784 and deemphasizing the contributions of Langdell).

¹⁹ Langdell stated: “[L]aw is a science . . . all the available materials of that science are contained in printed books. . . .” HURST, *supra* note 3, at 185 (quoting C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871)).

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law.²⁰ These days, the overall thrust of the curriculum in most law schools is basically the same, albeit with some modest tinkering around the edges.²¹ Law schools have adopted curricular reforms in recent decades that have moved somewhat beyond the Langdellian model.²² For example, most if not all American law schools require students to take a course on legal writing, and most schools offer more elective skills courses such as trial practice, negotiation, and client counseling than they used to.²³ Moreover, most law schools now offer the chance for some clinical “hands-on” education for at least a few students.²⁴

Nonetheless, it remains true that typical American law students earn most of their credits from classes in which they focus primarily on analyzing

²⁰ Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study In Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397, 410 (1998); Sonsteng et al., *supra* note 16, at 402.

²¹ See Sonsteng et al., *supra* note 16, at 400–02. Some variations of the first-year curriculum involve shrinking some or all of these basic courses to one semester and adding courses such as legal writing, constitutional law, or an elective.

²² A few schools have recently taken steps that move them significantly beyond the typical curriculum. For example, Washington and Lee University School of Law recently set up a program that makes the entire third year of law school far more practical and skills oriented. “Traditional classroom instruction will be replaced by practice simulations, real-client interactions and the development of law practice skills.” Washington and Lee University School of Law, W&L School of Law Receives \$2 Million Gift for Third Year Reform, Mar. 5, 2009, <http://law.wlu.edu/news/storydetail.asp?id=518>.

²³ Writing in the 1980s, Harvard Professor Albert M. Sacks saw substantial changes between the Harvard curriculum of the 1950s and the Harvard curriculum of the 1980s, focusing especially on the growth of courses in ADR. Albert M. Sacks, *Legal Education and the Changing Role of Lawyers in Dispute Resolution*, 34 J. LEGAL EDUC. 237, 239–40 (1984). Yet, while praising the growth in dispute resolution courses that had occurred in the 1980s, he also raised the question of whether it might be appropriate to rethink even that sacred lamb, the required first-year curriculum. He stated:

What troubles me is the feeling that our present emphasis on litigation in law school study is not a function of a rounded analysis of the place of litigation in the life of most practicing lawyers or in the provision of legal services generally, or in the development of new law. It may flow, rather, from the interplay of a past pedagogy that focused almost exclusively on appellate litigation and present pressures from the bench and bar that stress visible competence in the courtroom.

Id. at 244.

²⁴ For excellent discussions of the evolution of clinical education see Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 5–21 (2000). See generally Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612, 616–18 (1984).

appellate cases, doing little writing, gathering no facts, and paying little attention to the realities of the clients' underlying interests. To the extent students learn skills apart from pure legal analysis, they typically do so either in occasional clinical or skills classes, or in summer jobs or externships.

The problem with the Langdellian model is not that its subjects or methods are inappropriate, but rather that they convey seriously distorted messages about law and lawyers and therefore fail to convey additional needed information and skills. These messages are mostly implicit in the structure of law school courses, erroneously suggesting that the bulk of what lawyers do is to analyze and argue appellate law, and that other functions are less common or important. The implicit nature of these messages, which are repeatedly reinforced in multiple courses, conveys a powerful subliminal lesson. Because many law students are not consciously aware of the message about lawyers' roles, it is particularly hard to correct.

B. Renewed Interest in Curricular Reform to Enhance Teaching of Lawyering

Critiques of the Langdellian approach to legal education are not new. Experts have long recognized that lawyers need multiple competencies to be effective in practice²⁵ and, for close to one hundred years, experts have been issuing reports calling for reforms of legal education.²⁶ A common theme in these reports is law schools' insufficient focus on the skills needed to practice law. For example, in 1914, the Carnegie Foundation for the Advancement of Teaching in its "Redlich Report" argued that the case method of instruction should be supplemented by teaching law in a more holistic and practical manner.²⁷ In 1921, the Carnegie Foundation-funded "Reed Report" criticized the overemphasis on legal theory and underemphasis on practical training.²⁸ In 1971, the Association of American Law Schools issued the "Carrington Report" urging that the traditional first-

²⁵ See generally HOWARD GARDNER, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES (2d ed. 2004) (explaining the theory of seven different "intelligences" that impact human learning and talents).

²⁶ For more detailed discussion of prior reports than the brief review in this Article, see, e.g., DAVID I. C. THOMSON, LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE 59–67 (2009); Sonsteng et al., *supra* note 16, at 363–88.

²⁷ See generally REDLICH, *supra* note 17 (using scientific approaches to promote practical methodology in law).

²⁸ See generally ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921) [hereinafter REED REPORT] (emphasizing the importance of varied legal experiences instead of formal education).

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year curriculum be replaced with courses teaching, *inter alia*, legal advocacy, legal decision making, and planning.²⁹ These courses would focus on the actual practice of law.³⁰ In 1979, the ABA's "Cramton Report" made twenty-eight recommendations to promote greater experimentation in legal education, including providing "instruction in those fundamental skills critical to lawyer competence."³¹ In 1992, the American Bar Association's MacCrate Report recommended that law schools teach ten "fundamental lawyering skills" including factual investigation, communication, counseling, negotiation, and litigation and ADR procedures.³²

Today the drumbeat continues, as legal education is focused on the 2007 Carnegie Foundation report, "Educating Lawyers: Preparation for the Profession of Law."³³ Echoing past efforts, the Carnegie Report recommends that law schools provide a curriculum that integrates instruction of legal doctrine and analysis, practical skills, and development of professional identity from the beginning of law school in order to do a better job of preparing students for the practice of law.³⁴ Also in 2007, the Clinical Legal

²⁹ See generally PAUL D. CARRINGTON, ASS'N AM. L. SCHS., TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW: 1971, PART ONE, SECTION II (1971), reprinted in HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 93 (1972) [hereinafter "Carrington Report"] (proposing significant changes to legal education, including shorter degree programs and more emphasis on useful skills).

³⁰ Indeed, the Carrington Report urged heavy use of adjuncts, as "[f]ew who select themselves as academic lawyers are motivated by an intense interest in the practical arts. . . ." *Id.* at 130–31. Also in the 1970s, academics E. Gordon Gee and Donald W. Jackson published a voluminous study based on an investigation of ten law schools. E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 BYU L. REV. 695. They urged that law schools must do a better job of "steer[ing] a course between the Scylla of 'practical experience' and the Charybdis of 'systematic academic preparation.'" *Id.* at 761.

³¹ *Report and Recommendations of the Task Force of Lawyer Competencies: The Role of Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B. 3, 4–7 [hereinafter "Cramton Report"].

³² See generally *Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B. 138–40 [hereinafter "MacCrate Report"]. For a good discussion of the MacCrate Report and the extensive scholarship that followed in its wake, see Symposium, *The 21st Century Lawyer: Is There a Gap to be Narrowed?*, 69 WASH. L. REV. 517 (1994). See also Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 116–24 (2001) (describing reactions to the MacCrate Report).

³³ SULLIVAN ET AL., *supra* note 16.

³⁴ *Id.* at 27–33, 194–97.

Education Association issued a report recommending increased experiential learning to integrate legal theory and practice.³⁵

Some of the critiques of legal education are based on surveys of practicing attorneys looking at what they do and how well they believe they were prepared for the practice of law. The American Bar Foundation published studies of lawyers in 1981³⁶ and 1993,³⁷ and researchers John Sonsteng and David Camarotto published a study in 2000 identifying skills that lawyers need.³⁸ Large majorities of the lawyers surveyed agreed that seventeen specific skills are important,³⁹ but few of the lawyers believed that they were well-prepared by law school to perform such tasks as diagnosing and planning solutions for legal problems, instilling others' confidence, negotiation, fact gathering, drafting legal documents, counseling, obtaining and keeping clients, and managing legal work.⁴⁰ A recent study of law graduates' preparedness to become lawyers casts doubt, as well, on the admissions criteria used by most law schools.⁴¹

Legal academics have published their own critiques of legal education as well. Perhaps surprisingly, academics too have focused on the inadequacy of skills training in law schools.⁴²

³⁵ STUCKEY ET AL., *supra* note 16.

³⁶ FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981).

³⁷ Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993).

³⁸ See John Sonsteng & David Camarotto, *Minnesota Lawyers Evaluate Law Schools, Training and Job Satisfaction*, 26 WM. MITCHELL L. REV. 327 (2000).

³⁹ *Id.* at 335.

⁴⁰ See Sonsteng et al., *supra* note 16, at 378–89 (summarizing results from the three studies). In a similar type of study, in 2006, researchers Julie Macfarlane and John Manwaring conducted a legal “skills audit” of Ontario lawyers and developed a taxonomy of critical legal skills and knowledge using focus groups of lawyers. See Julie Macfarlane & John Manwaring, *Reconciling Professional Legal Education with the Evolving (Trial-less) Reality of Legal Practice*, 2006 J. DISP. RESOL. 253. The six categories of skills in the final taxonomy involve client relationships, dispute resolution, transactional work, legal research and writing, practice management, and ethical issues and professionalism. *Id.* at 259–64.

⁴¹ See Marjorie M. Shultz & Sheldon Zedeck, *Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering* (2008). This report is discussed *infra* in Part IV.D.

⁴² One eminent critic of legal education was Lon L. Fuller, widely renowned for his jurisprudential work. As chair of a Harvard Law School Curriculum Committee, writing in the 1940s, he emphasized the flaw in exposing students only to the world of appellate cases, and instead urged that they be taught about the processes of the law office and the

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In short, over the last century, and particularly in recent years, there has been recognition that the law school curriculum should be reformed to better prepare lawyers for the real world of practice. In addition to strong analytical capabilities, lawyers need various other strengths including perseverance, judgment, interpersonal skills, and the ability to communicate effectively both orally and in writing. Despite the need for multiple competencies, law curriculum⁴³ focuses overwhelmingly on analytical capabilities, highlighting the study of appellate decisions, and evaluating students using tests focused almost exclusively on analysis of legal doctrine and policy. We urge that ADR curriculum and faculty can play an important role in bringing about necessary changes.

C. Specific Problems

1. Too Little Instruction in Skills Other than Legal Analysis and Argument

As noted above, a number of critiques highlight law schools' curricular deficits by comparing the skills actually used by attorneys to those taught in law school. For example, the MacCrate Report⁴⁴ identified ten "fundamental lawyering skills":

courtroom. See Sacks, *supra* note 23, at 239; Robert S. Summers, *Fuller on Legal Education*, 34 J. LEGAL EDUC. 8 (1984). A more recent academic critique was penned by a current law school dean, Richard Matasar. Richard A. Matasar, *Skills and Values Education: Debate About the Continuum Continues*, 46 N.Y.L. SCH. L. REV. 395, 408–14 (2003). His article gives law schools poor grades in all of the MacCrate skills except legal analysis (A-), legal research (B+), and communication (B+). *Id.* For yet another academic critique of existing legal education see Sonsteng et al., *supra* note 16, at 318 (arguing that existing legal education "does not provide a significant source of training in nine legal practice skill areas: (1) understanding and conducting litigation; (2) drafting legal documents; (3) oral communications; (4) negotiations; (5) fact gathering; (6) counseling; (7) organizing and managing legal work; (8) instilling others' confidence in the students; and (9) providing the ability to obtain and keep clients"). For a thoughtful essay urging law schools to teach students about professional responsibility to address clients' human and ethical needs as well as legal needs, see Nancy A. Welsh, *Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically*, 2008 J. DISP. RESOL. 45, 57–59.

⁴³ Our focus in this Article is curriculum, for the most part taking as given the general profile of law students currently admitted to law school. However, characteristics of students admitted are also tremendously relevant to the question of what type of lawyers will be produced by law schools. See *infra* Part IV.D.

⁴⁴ See MacCrate Report, *supra* note 32.

1. “problem solving;”
2. “legal analysis and reasoning;”
3. “legal research;”
4. “factual investigation;”
5. “communication;”
6. “counseling;”
7. “negotiation;”
8. “litigation and ADR procedures;”
9. “organization and management of legal work;” and
10. “recognizing and resolving ethical dilemmas.”⁴⁵

Other reports and studies use different lists of skills,⁴⁶ but we think the particular lists are less important than the general insight that the bulk of law school instruction is focused on legal research, analysis, and reasoning with relatively little attention to the other important skills.⁴⁷

Lawyers should be good legal analysts—able to interpret legal materials on behalf of their clients—but these skills are not sufficient for the effective and competent practice of law. Lawyers should be both legal advocates and problem solvers for their clients.⁴⁸ Lawyers should be able to help their

⁴⁵ *Id.* at 135, 138–40.

⁴⁶ See STUCKEY, *supra* note 16, at 50–53.

⁴⁷ See MacCrate Report, *supra* note 32, at 236. The MacCrate Report itself does not focus sufficiently on the human aspects of lawyering. See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report – Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 600–02 (1994) (emphasizing that lawyers do far more than “think like a lawyer,” in the narrow doctrinal sense).

⁴⁸ See, e.g., Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401, 405 (2000) (“Effective lawyers do not practice law. They solve problems, using law as one among many professional tools.”); see also Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 358–59 (1998) (stating that lawyers do and should do more than think like appellate lawyers); John B. Mitchell et al., *And Then Suddenly Seattle University Was on Its Way to a Parallel, Integrative Curriculum*, 2 CLINICAL L. REV. 1, 21 (1995) (“[T]oo many students graduate with a vast doctrinal base of knowledge sealed within a context that is not translatable to practice.”).

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clients consider their legal options in the broader context of their more general goals and interests.⁴⁹ Lawyers should, for example, be prepared to help clients consider economic, reputational, psychological, moral, and justice implications of alternative courses of action, as appropriate.⁵⁰

In particular, some of lawyers' important roles include the following:

Interviewer: As interviewers, lawyers should employ good interpersonal skills to obtain important information from clients and build a strong rapport. In addition to interviewing clients, lawyers must also interview others, such as witnesses and potential jurors. Moreover, lawyers informally interact with a wide range of other actors including opposing counsel, judges, court clerks, office colleagues, and their office assistants, among others. A knowledge of psychology can help lawyers become more effective in all these contexts.⁵¹

Counselor: As counselors, attorneys should use their legal knowledge and research tools to find legal answers that may aid their clients, and attorneys should also be prepared to help clients consider a range of non-legal factors, such as effect on relationships and reputation, that may affect clients' interests and shape clients' decisions. Lawyers should use good interpersonal skills to describe and analyze the clients' options and help them select among them.

Process-selection advisor: Lawyers should help clients decide among various process alternatives including negotiation, mediation, arbitration,

⁴⁹ We use the term "interest" in the sense it is used in the ADR pedagogy, which is underlying "needs, desires, concerns, and fears." ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 40 (Bruce Patton ed., Penguin Books 2d ed. 1991). Fisher and Ury famously counsel negotiators to distinguish between "positions," which are expressed demands, and "interests," which motivate the taking of a particular position. They explain that by exploring underlying interests, negotiators may sometimes reach a resolution that provides greater satisfaction than if the negotiators had merely tried to split the difference between two positions. As one of their examples illustrates, two men who were quarreling as to whether a window should be open or shut realized that opening a window in another room would provide air without creating a draft, thus serving both of their interests. *Id.* at 40–41.

⁵⁰ For our purposes, it is not important to wade into the battle regarding the extent to which attorneys are responsible to serve the interests of the public, or other persons, as well as their client. See generally Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 375, 437–40 (2006) (discussing lawyers' duties to serve both clients and the legal system); Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLINICAL L. REV. 65, 76–88 (1997) (proposing that lawyers be taught to encourage clients to consider various perspectives).

⁵¹ See generally Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437 (2008).

litigation, and the numerous variations and combinations of these processes, as well as use non-legal options such as seeking to resolve a dispute through a political process or in the press. Indeed, lawyers should create and tailor processes to satisfy their clients' interests.⁵² Attorneys should be prepared to help clients consider the advantages and disadvantages of dispute resolution strategies that might best advance clients' interests. This is important in dealing with ongoing disputes and also with transactional matters when planning how to handle potential future disputes.

Negotiator: Negotiation is a major part of the work of virtually all lawyers, regardless of whether they do civil or criminal cases, litigation or transactional work. Attorneys should be prepared to use psychological and economic insights, as well as legal analysis, to help clients decide whether, when, and on what terms to attempt to negotiate in a dispute or potential transaction.

Advocate: In any process, whether negotiation, mediation, arbitration, administrative tribunals, trial courts, or appellate bodies, good lawyers should be strong advocates for their clients. The nature of the advocacy should vary depending on the forum so that attorneys use legal analysis and communication skills likely to be effective in the particular forum. Thus, lawyers should use different approaches when persuading a judge or arbitrator to make a favorable decision than when persuading an opposing party to reach a favorable agreement.

Transactional problem-solver: Many attorneys draft agreements, rules, and other kinds of documents, or obtain authorization for various sorts of projects. To assist clients in such endeavors, attorneys should help clients develop various creative options and consider the advantages and disadvantages of the options.

2. Too Little Focus on Parties' Interests

One reason that it is so important for lawyers to learn skills in addition to legal analysis and argument is that the law is not the only, or necessarily

⁵² The ABA Section of Dispute Resolution Task Force on Improving Mediation Quality recommends that lawyers "customize" the mediation process for each case. See *Task Force on Improving Mediation Quality, Final Report*, 1979 A.B.A. SEC. DISP. RESOL. 12-13, available at <http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf>. Creating and tailoring a process is not limited to ADR, as Professors Michael Moffitt and Elizabeth Thornburg describe how lawyers can negotiate to tailor trial procedures to fit their clients' needs. See Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461 (2007); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181.

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most important, factor in representing clients. Much is made of lawyers' supposed duty of zeal, particularly by practicing lawyers or others who have not recently studied lawyers' professional responsibilities,⁵³ but there is relatively little attention given to the object of this duty, namely to promote clients' interests.⁵⁴ The preamble to the Model Rules of Professional Responsibility identifies the basic principle of the "lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law. . . ."⁵⁵ Unfortunately, most legal education, especially in core doctrinal courses, focuses almost exclusively on the boundaries of the law, with little attention to clients' interests. Moreover, part of the mythology of the "duty of zealous advocacy" is that lawyers are required to protect clients' interests by taking hard, adversarial positions on the assumption that there are only two possible outcomes: each side can win or lose where there is a zero-sum relationship between the options, so that one party's gain inevitably results in an equal loss by the other party.⁵⁶ Of course, sometimes there are only zero-sum options, and it is appropriate for lawyers to take uncompromising legal positions, but lawyers often can better advance their clients' interests by using negotiation or mediation to achieve a result that

⁵³ Although the old Model Code used to require lawyers to "represent [a] client zealously within the bounds of the law," MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1981), the more modern Rules of Professional Responsibility moved the zeal language to the preamble and a comment, where it has no binding impact. *See* MODEL RULES OF PROF'L CONDUCT pmb. 9, R. 1.3 cmt. 1 (2009). The black letter provision of the modern Rule 1.3 requires only that the attorney exercise "reasonable diligence" on behalf of the client. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007). Some question whether the shift from "zeal" to "diligence" is, however, very significant. *E.g.*, Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 40 (1996).

⁵⁴ As noted earlier, the term "interest" refers to clients' underlying desires, fears, etc. *See* FISHER & URY, *supra* note 49.

⁵⁵ MODEL RULES OF PROF'L CONDUCT pmb. 9 (2009). This preamble reflects the fact that while the law creates broad boundaries of permissible behavior, within these generally broad boundaries, lawyers are directed to focus on the clients' interests. Similarly, a comment to Rule 1.3 states "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2007).

⁵⁶ *E.g.*, Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 785-88 (1984) (presenting notion that one side's gain need not always be another side's loss). Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) (contrasting lawyers' typically win/lose approach to mediators' instinct to seek a harmonious solution).

satisfies *all* parties' interests.⁵⁷ This perspective, too, is missing from much of legal education. This omission not only reflects an implicit distortion of lawyers' professional responsibility and identity but also leaves graduates ill-prepared to serve their clients.

3. *Flawed Perspective of "Relevant" Facts*

As the Carnegie Report explains, the "case-dialogue" method of law school instruction has "valuable strengths," but it has significant deficits including a narrow conception of what facts are relevant.

[S]tudents are led to analyze situations by looking for points of dispute or conflict and considering as "facts" only those details that contribute to someone's staking a legal claim on the basis of precedent. . . . By contrast, the task of connecting these conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions, remains outside the method.⁵⁸

Too often, law school courses treat clients as little more than walking, talking fact patterns for litigation hypotheticals. Law schools generally do not provide law students with adequate training in how to obtain factual information, how to deal with facts that are confusing or complicated, how to tie legal analysis to richly complex factual situations, nor in how to think through social or ethical consequences of their legal conclusions.⁵⁹ Parties' interests in a matter normally are not considered "facts" relevant to courts' legal analysis, for example, but they are indeed very relevant to lawyers' decisions about how best to handle even adjudicatory matters. Under the ethical rules, lawyers "shall consult" with clients about the means of

⁵⁷ For a proposal to require lawyers and mediators to consider parties' interests in court-connected mediation, see Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 902–26 (2008).

⁵⁸ SULLIVAN ET AL., *supra* note 16, at 187; see also Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, (UNLV William S. Boyd Sch. Law & Legal Studies Research Paper No. 09-02), available at <http://ssrn.com/abstract=1266342> (arguing that lawyers should see clients as real people with real needs and interests, not merely as a bundle of legal rights).

⁵⁹ SULLIVAN ET AL., *supra* note 16, at 187–88; see also Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597 (2007) (discussing law schools' failure to focus sufficiently on factual ambiguities and urging law schools to train lawyers more broadly with problems akin to those used in business schools).

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pursuing the objectives of representation.⁶⁰ For example, clients may have interests in what claims should be made in a lawsuit, what relief should be sought, who might be called to testify or not, and what witnesses would or would not be asked.⁶¹ Clients have interests that may go beyond simply winning a lawsuit.⁶²

A major problem in the treatment of facts in legal education results from the heavy reliance on analysis of appellate case reports. In these opinions, given that our legal system does not permit new facts to be introduced on appeal, the facts as established by the trial court are necessarily viewed retrospectively and with great certainty. In practice, by contrast, lawyers and clients deal with legal matters prospectively, with much less certainty about the facts. Thus, fact-gathering is a major part of legal practice. Discovery is a major element of litigation, and transactional lawyers typically make significant “due diligence” efforts so that they can properly advise clients and negotiate transactions. Indeed, in litigation, even after the parties complete discovery, there is often considerable uncertainty about the legally relevant facts, which sometimes necessitates conducting trials to resolve contested factual accounts. Yet, in classes relying on the Socratic method of analyzing appellate cases, there is usually little or no recognition of the major problem for lawyers of dealing with uncertain facts that are clarified only after a period of time.

4. Too Narrow Portrayal of Lawyers' Roles

Law schools tend to do a poor job of portraying the many roles that lawyers can play. Along these lines, the recent Carnegie Report was particularly critical of law schools' failure to provide an adequate

⁶⁰ MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009).

⁶¹ See Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 33–36 (1998) (presenting data about criminal defense lawyers' views about consulting with clients about twelve types of decisions).

⁶² For example, one of us once represented a client in an age discrimination matter. Originally, the lawsuit sought compensatory damages for medical and psychological injury as well as back pay. However, when the client learned that if we insisted on pursuing a claim for compensatory damages she would need to allow the defendants access to her psychological records, she chose to drop the claim for compensatory damages.

“apprenticeship of identity” from the outset of law school.⁶³ Law students would understandably think that disputes are mostly resolved by judges and that lawyers spend most of their time in appellate litigation. To the extent that lawyers engage in pretrial or trial advocacy, it seems to be mostly a predicate for the apparent “real” action, (i.e., appellate litigation). Rather than focusing on lawyers’ goal of serving clients’ interests, too often law schools portray this goal as simply figuring out the law correctly and winning lawsuits. The implication is that clients will be satisfied if their lawyers are clever and win in court, regardless of the clients’ underlying interests in a case, including interests in efficient dispute resolution. Yet, these views of judging and lawyering are not accurate.⁶⁴

Certainly judges do decide cases, but the vast majority of disputes are not resolved by judges. Instead, even when those disputes are filed in court, they are more often resolved in negotiation, negotiation aided by mediation, or through arbitration.⁶⁵

Similarly, while it is true that some lawyers do engage in appellate lawyering, this is just a small part of how disputes are resolved and how lawyers spend their time. Many disputes are resolved without a lawsuit being filed, and often without a lawyer even being consulted. But even after clients consult lawyers, they often decide that a lawsuit should not be filed. Perhaps the law or facts do not warrant filing a claim, or perhaps despite strong facts and law, it still does not make sense to file a legal claim. It is common that,

⁶³ SULLIVAN ET AL., *supra* note 16, at 28 (discussing the apprenticeship of identity as the third apprenticeship of professional education); *see also* Amsterdam, *supra* note 24, at 612–13 (stating that law professors should help students understand the complex roles they will undertake).

⁶⁴ *See, e.g.*, Kerper, *supra* note 48, at 358–59 (lawyers do much more than think like appellate judges).

⁶⁵ In 2008, just 2% of the civil cases filed in United States federal district courts were resolved at trial. U.S. DIST. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2008, TBL. C-4 (2008), *available at* <http://www.uscourts.gov/judbus2008/appendices/C04Sep08.pdf>. While some of the cases that do not make it to trial are resolved by judges on motion, *see* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, it remains true that about seventy percent of cases do settle. Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994). The percentage of settlements that can be attributed to mediation is not known. Nor is it known what percentage of disputes, because they are resolved in binding arbitration, do not enter the litigation system at all. *See* Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution”*, 1 J. EMP. L. STUDS. 843 (2004). *See generally* Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7.

from a purely financial perspective, the likely benefits of filing a lawsuit do not outweigh the likely costs. Also, lawyers and clients must consider nonfinancial costs such as time, morale, reputation, and emotional distress. These also often weigh against filing a lawsuit. Once a lawsuit has been filed, these sorts of factors often lead to resolving disputes by settlement rather than adjudication in court. Thus, while many lawyers do spend a portion of their time on appellate litigation, it is a very small proportion of most lawyers' time. Lawyers spend much more of their time interviewing and counseling clients, conducting pretrial litigation, negotiating deals and disputes, and, in a relatively small proportion of cases, engaging in trial advocacy.⁶⁶

5. Too Little Use of Knowledge from Other Disciplines

Because effective legal practice requires knowledge and skills in addition to legal analysis, law school curricula should include relevant insights from other disciplines. Interdisciplinary tools can be very helpful in understanding how the legal system works, what lawyers do, and how people behave. Many faculty produce interdisciplinary scholarship, and thus have some familiarity with the work of other disciplines such as economics, sociology, or psychology. However, law schools generally include these subjects as occasional electives, if at all.

While some interdisciplinary literature is primarily theoretical, other material has obvious practical application. For example, psychologists have done a great deal of work that can help lawyers be better communicators, investigators, and problem solvers.⁶⁷ Providing insights with respect to memory, lying, listening, empathy, and persuasion, psychology can help lawyers be more effective in interviewing and counseling their clients and witnesses, conducting depositions, negotiating, and writing persuasively.⁶⁸

Economists' and accountants' work, similarly, can be useful in teaching students how to evaluate clients' and attorneys' options. Using such tools as decision trees⁶⁹ can help attorneys to counsel their clients regarding the pros

⁶⁶ See, e.g., R. LAWRENCE DESSEM, PRETRIAL LITIGATION: LAW, POLICY & PRACTICE 5 (West 2007) (reporting lawyers on average spend just 9.5% of their time on trials, hearings, appeals, and enforcement).

⁶⁷ See, e.g., Sternlight & Robbennolt, *supra* note 51.

⁶⁸ See JENNIFER ROBBENOLT & JEAN R. STERNLIGHT, PSYCHOLOGY AND LAWYERING (forthcoming 2010).

⁶⁹ See, e.g., Marjorie Corman Aaron & David P. Hoffer, *Using Decision Trees as Tools for Settlement*, 14 ALTERNATIVES TO HIGH COST LITIG. 71 (1996). Interested attorneys can obtain litigation risk-analysis software to help them employ the decision

and cons of particular options. Understanding how interest rates function can be critically important as attorneys help clients understand when particular settlement proposals are desirable.⁷⁰

6. Too Little Integration of Doctrinal, Litigation, Transactional, and ADR Instruction

To the extent that law schools have gotten the message that students need to learn about subjects in addition to appellate cases, they have often tried to fill this need by offering occasional electives in subjects such as ADR, interviewing and counseling, or psychology and law. Yet, this supplementation approach may not help very much and may even heighten the problem of law students being too focused on judging and appellate lawyering.

Despite occasional supplementation, most law students remain focused on appellate cases because there are many more courses, many of which are required, focusing on appellate case analysis. This focus sends the implicit message that appellate case analysis is “real law” and more important than other parts of the curriculum.⁷¹ Moreover, electives such as ADR courses compete against other electives and other aspects of students’ lives. As long as ADR concepts are taught only or primarily in elective courses, ADR faculty sometimes just “sing to the choir” of students who already have some appreciation of its value. The same is true of other elective courses teaching lawyering concepts, including some courses that focus on litigation.

A particularly serious problem with the supplementation approach is that it gives students the false impression that ADR approaches and other lawyering skills are truly separable from legal analysis. When ADR, even if required, is taught solely in separate courses, students often get the impression that a particular dispute can either be handled exclusively through litigation or exclusively through a form of ADR. Yet, as one of us has

tree analysis. See Robert Murrill, *Casing the Case*, LAW.COM, March 27, 2003, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005534766>. For one lawyer’s tutorial on how decision trees can be useful in practice, see Michael D. Freeborn, *Decision Trees for Lawyers*, http://www.freeborn.com/decision_trees.htm (last visited Oct. 18, 2009).

⁷⁰ Attorneys not only need to understand that \$1,000 paid a year in the future is worth less than \$1,000 paid today, but they need to know how to make the more precise calculation or at least use a computer program or expert to make that calculation.

⁷¹ One indicator of the lesser perceived importance of ADR courses is the fact that they are often taught by adjunct faculty rather than tenured or tenure-track faculty.

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explained at length,⁷² litigation and other forms of dispute resolution are closely intertwined in the real world. A single dispute may give rise to unsuccessful settlement negotiations, birth a complaint, be referred to court-connected, non-binding arbitration, inspire a de novo appeal, and then ultimately be settled following discovery and multiple motions. Thus, students need to learn that ADR is not simply an option or a complete and separate alternative to litigation. Indeed, Professor Marc Galanter coined the term “litigotiation” to refer to “the strategic pursuit of a settlement through mobilizing the court process,”⁷³ explaining that this is the normal way that most lawyers approach litigation and negotiation.⁷⁴ Thus the same lawyers who litigate must be prepared to resolve disputes through ADR, and the same lawyers who resolve disputes through ADR must be prepared to litigate.

It is similarly a mistake to address client interviewing and counseling, fact gathering, and other lawyering skills only in particular courses devoted to those subjects. Of course, it is good to offer such courses, but students need to be taught that *all* lawyers need these skills and that client counseling and fact gathering relate to all their doctrinal courses. Similarly, transactional attorneys should understand the entire package of dispute resolution possibilities when drafting dispute resolution clauses or other contracts for their clients. All lawyers should understand the interaction between legal analysis and the preparation of documents, the counseling of clients, and the consideration of settlement possibilities. Thus, it is just as bad to teach ADR courses without significant discussion of the importance of legal doctrine as it is to teach doctrinal courses without serious reflection of ADR.

III. BARRIERS TO CURRICULAR REFORM AND FORCES THAT MIGHT PROMOTE CURRICULAR REFORM

Any proposed curricular reform in law schools, no matter how inherently valuable, faces an uphill battle for many understandable reasons. The following is a list of some reasons why it is so hard to make substantial changes in law school curricula. We engage in this exercise on the theory

⁷² See generally Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681 (2005).

⁷³ Marc Galanter, *World of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

⁷⁴ One of us adapted this term, defining “liti-mediation” culture as one where it is “taken for granted that mediation is the normal way to end litigation.” John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 841 (1997). This practice culture is common in jurisdictions where courts require parties to mediate before going to trial. *Id.*

that understanding the barriers may help us overcome them, at least in small ways.

Our discussion of barriers to curricular reform will draw, in part, on the experiences of the University of Missouri⁷⁵ in adopting a curriculum in 1985 that systematically integrated ADR into all required first-year courses to some degree.⁷⁶ The University of Missouri has long been recognized as one of the U.S. law schools most focused on the teaching of ADR.⁷⁷ In the early 1980s, Leonard Riskin, Director of the school's Center for the Study of Dispute Resolution, obtained a book contract and substantial grants that allowed him to use financial incentives to encourage faculty members in various courses to draft ADR exercises for inclusion in their regular doctrinal courses.⁷⁸ The project developed through a collaborative effort involving well over half the law school faculty. The Center trained all faculty members in ADR, encouraged interested professors to devise ADR exercises for their courses, and then offered coaching and other assistance.⁷⁹ One can debate whether, at its height, the Missouri program adequately integrated ADR throughout the curriculum.⁸⁰ Nonetheless, it certainly did far more than most

⁷⁵ Both of us either are or were faculty at the University of Missouri-Columbia, but neither of us were on the faculty there until 1999, substantially after the reforms were implemented. Our discussion of the Missouri experience will draw from published articles. See Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 50 FLA. L. REV. 589 (1998); Leonard L. Riskin & James E. Westbrook, *Integrating Dispute Resolution into Standard First-Year Law School Courses: The Missouri Plan*, 39 J. LEGAL EDUC. 509 (1989). It will also draw on our discussions over the years with current and former colleagues at the University of Missouri.

⁷⁶ Riskin, *supra* note 75, at 590.

⁷⁷ Missouri consistently is ranked as having one of the top ADR programs in Best Law Schools Specialty Rankings: Dispute Resolution, U.S. NEWS & WORLD REPORT, available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/dispute-resolution> (for 2009, University of Missouri Law School is ranked second in the country in dispute resolution).

⁷⁸ The courses were contracts, civil procedure, criminal law, property, torts, and legal research and writing. Riskin, *supra* note 75, at 592–94; Riskin & Westbrook, *supra* note 75, at 509.

⁷⁹ The exercises are provided as part of the teacher's manual to the text LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* (4th ed. 2009); LEONARD L. RISKIN & JAMES E. WESTBROOK, *INSTRUCTOR'S MANUAL WITH SIMULATION AND PROBLEM MATERIALS TO ACCOMPANY DISPUTE RESOLUTION AND LAWYERS* (1987).

⁸⁰ Although the program had students in each doctrinal first-year class do an exercise involving negotiation, mediation, or arbitration, it is not clear to us whether the program changed law students' perspective on the nature of lawyering. The ADR materials in one sense were integrated into the doctrinal materials, but often not as

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schools have done. At this point, however, twenty-five years later, the Missouri integrated-curriculum program no longer exists as it once did. Instead, Missouri currently requires all first-year students to take a two-credit survey course entitled, “Lawyering: Problem-Solving and Dispute Resolution,” which provides a brief overview of interviewing, counseling, negotiation, advocacy in mediation and arbitration, and selection of dispute resolution processes.⁸¹ The change in the Missouri program perhaps is not surprising considering that few of the faculty who initially incorporated ADR in first-year doctrinal courses still teach at Missouri, and coordination of all the first-year sections required substantial administrative effort. Although the original Missouri initiative was an impressive first-generation experiment, it illustrates the challenges of curricular reform under even the best of circumstances. Moreover, although the new “Lawyering” course provides more coherent instruction of ADR than the original initiative, it does so by reducing the integration of ADR in first-year doctrinal courses.⁸²

In a typical law school, curricular reform only happens if the faculty wants it to happen. Deans or powerful committee chairs may propose such reforms, but few deans have the power to impose new curricular initiatives in the face of active, or even passive, faculty resistance. Committee chairs will

completely as we would have liked. It seems that many professors simply devoted one or two class periods to the ADR exercise, which was not necessarily to be tested on the exam, and then spent the remainder of the course teaching as usual. Professor Ronald Pipkin conducted an evaluation of the Missouri program which showed that, compared with students at two other schools, Missouri students increased their problem-solving mindset. See Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia*, 50 FLA. L. REV. 609, 626–30 (1998). At the end of the first year of law school, Missouri students also had a high level of ADR knowledge, though the level of knowledge was not as great as at one of the other schools. *Id.* at 623–26.

⁸¹ University of Missouri, School of Law, JD Program Course Descriptions, <http://law.missouri.edu/academics/curriculum.html#5095> (last visited Oct. 19, 2009) (describing Lawyering course). In terms of Michael Moffitt’s typology, Missouri shifted from “salting” all the required first-year courses with ADR instruction to requiring all first-year students to get ADR instruction in a single “vitamin” course. See Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. ON DISP. RESOL. 25 (2010).

⁸² Of course, other law schools have also undertaken initiatives to integrate ADR into legal curricula. For example, Missouri received a grant to provide technical assistance to six other law schools. See generally Symposium, *Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges*, 50 FLA. L. REV. 583 (1998) (describing curricular initiatives at Missouri and the other six schools). Each of the schools has had achievements and challenges.

be successful only if they can convince faculty members of the need for change. In Missouri, curriculum reform succeeded, at least initially, with the support of a dean and committee chair as well as faculty who became committed to the goals of the project and were given financial incentives to develop new curricular materials.

The high degree of specialization of legal knowledge is also a major structural barrier to curricular change. Tenured and tenure-track faculty have strong interests in continuing the existing curriculum because of their commitments to specialized doctrinal areas of the law, which affect both scholarship and teaching. These days, law professors tend to be rewarded primarily for their success as scholars, rather than for their prowess in teaching or service. Their own institutions look primarily to scholarship when awarding tenure, promotion, and salary increases. Similarly, external institutions focus on scholarship when awarding new jobs and prizes. Doing scholarship is very time-consuming, and specialization creates strong incentives for faculty to focus narrowly on a few substantive areas, at most.⁸³ Moreover, law schools and individual faculty have interests in having faculty teach in the same subjects about which they write. Faculty and administrators believe that the interaction of scholarship and teaching enhances the quality of both activities. The greater the investment in specialized scholarship and teaching, the greater the cost of making changes that would require professors to move outside their area of specialization. The Missouri program was acceptable to specialized faculty because it did not require them to make a large investment of time to learn new material.

The structure of bar exams, which parallel law school curricula and predominantly test legal doctrine, reinforces decisions to generally maintain existing curricula.⁸⁴ Faculty and administrators may fear that significantly changing the curriculum would risk decreasing bar passage rates, which would be problematic not only for the individual students but also for the school's rankings in the almighty *U.S. News* survey.⁸⁵

⁸³ But see Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 810–11 (1998) (finding that professors who taught a large number of different courses on average published more articles than their peers).

⁸⁴ Students are understandably concerned about learning material that will help them pass the bar exam, particularly in these times of economic exigency. E.g., Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 WASH. U. J.L. & POL'Y 11, 34–35 (2003) (discussing students' resistance to non-Bar material).

⁸⁵ For multiple authors' discussion of the perceived importance of *U.S. News* rankings to law schools, see Symposium, *Dead Poets and Academic Progenitors: The Next Generation of Law School Rankings*, 81 IND. L.J. 1 (2006). Doing well in *U.S. News*

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A somewhat related concern is that some faculty are concerned about covering as many topics as they can in their courses. In “bar courses,” faculty may want to prepare students as well as possible for the bar exam and may believe that broad coverage is useful to that endeavor. Even for courses that are not tested on the bar exam, faculty typically want students to absorb as much material in their particular field as they reasonably can.⁸⁶ Many faculty members feel that they cannot cover as much material as they would like as it is, so they may be reluctant to make changes that would reduce the amount they can cover within the time available. Although we believe that many faculty place too much importance on the value of maximizing coverage as compared with other educational tasks, this reflects a widespread ethic among law school faculty. Perhaps for this reason, the Missouri program generally required faculty to devote only one to two hours per semester to the ADR materials.⁸⁷

The forces of inertia make it difficult for faculties to agree on significant curricular changes—which, in itself, may discourage faculty from investing much energy in trying to develop such agreements. As noted above, faculty members generally have an interest in maintaining the status quo, and when faculty are tenured, there is little leverage over their decisionmaking. Considering that scholarship is the top priority at most schools, many faculty would prefer to focus on scholarship, over which they have great control, as opposed to curricular reform, which provides fewer benefits and is much more difficult to achieve because it depends on achieving agreement with one’s colleagues.⁸⁸ The process of curricular reform requires that faculty

rankings has become so important that multiple authors even teach law schools how to “game” the system to improve *U.S. News* rankings. *E.g.*, Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 232–42 (2006); *see also* Louis H. Pollak, *Why Trying to Rank Law Schools Numerically Is a Non-productive Undertaking: An Article on the U.S. News & World Report 2009 List of “The Top 100 Schools,”* 1 DREXEL L. REV. 52 (2009) (suggesting that ranking law schools is counter-productive to the health of legal education).

⁸⁶ See Lea B. Vaughn, *Integrating Alternative Dispute Resolution (ADR) into the Curriculum at the University of Washington School of Law: A Report and Reflections*, 50 FLA. L. REV. 679, 693 (1998) (noting that some faculty resist adding ADR because they fear losing course coverage).

⁸⁷ See Riskin, *supra* note 75, at 592–94. The torts and civil procedure courses involved up to three hours on ADR in the fall semester as did the property course in the winter semester. *Id.*

⁸⁸ See Clayton P. Gillette, *Law School Faculty as Free Agents*, 17 J. CONTEMP. LEGAL ISSUES 213, 227 (2008) (observing that faculty are far more frequently hired for their scholarship than for their success at curricular reform).

spend substantial time thinking and arguing about the curriculum, and faculty generally do not enjoy spending their time at meetings to discuss the curriculum.⁸⁹

Moreover, many law faculty members tend to have “conservative” attitudes⁹⁰ about reform. Law professors often value tradition. It is not unusual for faculty to believe that the law school curriculum worked well for them when they were law students and that it should work well for current law students as well.⁹¹ After a regime has been institutionalized for a while, many people act as if it has always been that way and have a hard time imagining any alternative. Indeed, people may not realize that an existing regime was revolutionary at one time and initially may have faced resistance to adoption. For example, when Langdell instituted his curricular reforms in the 1870s, he initially encountered strong resistance from faculty and students and a decline in enrollment.⁹² For most contemporary law faculty and students, this is ancient history of which they are not aware.

In addition to the preceding barriers to adopting any substantial curricular reforms, additional barriers may block curricular reform attempts geared to provide instruction in skills in addition to legal analysis.⁹³ The current doctrinal courses are relatively inexpensive, as most such courses can be taught in a large lecture format.⁹⁴ One professor can teach one hundred students or more at one time, using a combination of lecture and Socratic discussion. By contrast, skills and clinical courses are much more labor-intensive and require much smaller student-faculty ratios to provide closer interaction and observation. Moreover, some faculty believe that law schools

⁸⁹ For additional discussion of problems of coordination of instruction between faculty members, see *supra* Part I.

⁹⁰ We use the term “conservative” to mean reluctance to change, rather than referring to a political philosophy. We believe that political liberals may be just as conservative in their attitudes about changing the legal curriculum as political conservatives.

⁹¹ “Law professors, often among the most academically successful under the traditional education system, may resist change because they prefer to replicate the environment in which they achieved success.” Sonsteng et al., *supra* note 16, at 352.

⁹² See *id.* at 326.

⁹³ For good discussion of some of the difficulties encountered by those attempting to enhance the clinical curriculum, see Barry et al., *supra* note 24, at 5–32, 50–71.

⁹⁴ See Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595, 595 (2008) (recognizing cost-effectiveness of large lectures); Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 GERMAN L.J. 717, 731 (2009) (observing that high cost of skills and clinical courses may drive curricular reforms).

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should not focus much of the curriculum on legal practice because students can learn these skills after they graduate.⁹⁵

Although we have set out a daunting set of barriers to the adoption of substantial curricular reform, there are some forces that might promote reform. Despite the emphasis on scholarship at many law schools, the vast majority of faculty members are sincerely concerned about their students and want to give them the best possible preparation for legal practice. Many faculty members have legal practice experience and recognize that it is important for students to learn about skills in addition to legal analysis and argument.⁹⁶ In recent decades, there has been growing recognition of the importance of lawyers learning a broad range of skills, as reflected—and promoted—by a series of impressive reports and studies that have gotten a lot of attention.⁹⁷ Also, within the legal academy, the growth of ADR and clinical instruction has created a growing constituency for practice education.⁹⁸ ADR faculty offer the potential of helping promote curricular reform because many ADR faculty cross boundaries of doctrinal, litigation, transactional, and ADR instruction and have skills that can help colleagues better coordinate their curricular planning.

⁹⁵ Michael Woronoff, *What Law Schools Should Teach Future Transactional Lawyers: Perspectives from Practice* (UCLE Sch. of Law, Law-Econ. Research Paper, No. 09-17), available at <http://www.ssrn.com> (search “1430087”) (urging that practitioners are better equipped than law schools to teach many aspects of law practice).

⁹⁶ Of course, those professors who lack practice experience may be less enthusiastic about skills training. One study from several years back showed that 20% of law faculty had no practice experience and that the average professor had just 4.3 years of experience. Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J. L. REFORM 191, 217–18 (1991). We suspect that law professors have less practice experience today on average than faculty did in 1990.

⁹⁷ See *supra* Part II.B.

⁹⁸ The clinical legal education movement has grown tremendously and has become an established part of legal education. See Barry et al., *supra* note 24, at 5–50. The ADR field has also grown in legal education. Professor Michael Moffitt analyzed the 2007–2008 edition of the AALS Directory of Law Teachers and found that 569 faculty members listed themselves as being engaged in ADR, making it the 25th largest sub-discipline of the 96 included in the directory. Moffitt, *supra* note 81, at 27–33, 34, 72.

IV. PROPOSALS FOR REFORM

A. *Integrate Doctrinal, Litigation, Transactional, and ADR Instruction Throughout the Curriculum*

The law school curriculum should increase instruction of matters in addition to pure legal analysis and argument, and this instruction should occur in many parts of the curriculum. While the quantity of time devoted to teaching lawyering is important, we think that the degree to which lawyering concepts are integrated throughout the curriculum is even more important to make fundamental changes in law school pedagogy.⁹⁹

In the past twenty years, law schools have made some progress in supplementing the doctrinal law school curriculum with litigation skills and ADR courses. Unlike a few decades ago, it is extremely common for law schools to offer courses such as trial practice and pretrial litigation. Most offer litigation-related clinics as well.¹⁰⁰ Interested students typically do have the chance to take one or more courses involving litigation skills. Surveys show that many law schools offer at least one ADR course, and that many offer more than one.¹⁰¹ This is progress, but in our view, it is nowhere near

⁹⁹ Note that advocates of clinical education have made this same point, with respect to the integration of clinical methods into doctrinal courses. See Barry et al., *supra* note 24, at 32–50. Our proposal is also consistent with the recent *Best Practices Report*, which urges that law schools use multiple methods of instruction and correspondingly reduce reliance on the so-called Socratic Dialogue and Case Method. STUCKEY ET AL., *supra* note 16. The *Best Practices Report* offers pedagogical suggestions with respect to all aspects of law school teaching.

¹⁰⁰ The A.B.A. standards for Approval for Law Schools states, “A law school shall offer substantial opportunities for: (1) live-client or other real-life practice experiences. . . .” A.B.A. STANDARDS FOR APPROVAL OF LAW SCHOOLS § 302(b)(1)(2009), available at <http://www.abanet.org/legaled/standards/standards.html>.

¹⁰¹ A recent survey of law school curricula found that between 1992 and 2002, ABA-approved law schools substantially increased the number of pretrial skills courses including ADR, arbitration, interviewing and counseling, mediation, negotiation, and pretrial advocacy. See *A Survey of Law School Curricula: 1992–2002*, 2004 A.B.A. SEC. L. EDUC. & ADMISSIONS B. 34. ADR was the most frequently offered skills course in 2002. *Id.* Of 151 schools in this comparison, almost 140 offered an ADR course, about 120 schools offered mediation and negotiation courses, about 100 offered pretrial advocacy, about 80 offered arbitration courses, and about 80 offered interviewing and counseling courses. *Id.* A recent survey performed by the ABA Section on Dispute Resolution and the University of Oregon showed that of 176 schools who provided responses, 9 schools require ADR within a core curriculum, 65 offer but do not require ADR courses, and 42 offer clinics for hands-on ADR experience. <http://adr.uoregon.edu/>

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enough. Although law students who have an interest in mediation, negotiation, or arbitration at least have some chance to take courses in those areas, many law students graduate never being exposed to these important subjects. Transactional skills offerings are also fairly limited. Although the number of transactional offerings appears to be greater than we might have suspected, it is clear that litigation-oriented clinics and courses are still more prevalent.¹⁰²

As discussed above, we believe that merely offering additional skills courses is not sufficient to improve students' lawyering capabilities. Rather, it is important to integrate such instruction throughout the curriculum because reinforcing the messages about the various competencies in multiple places is likely to increase the educational impact on students. In addition, given the relatively rigid structure of law school instruction and the limited resources available, it seems unlikely that many schools would otherwise effectively convey these messages to the full student body. Thus, the essence of our proposal is to improve law school curriculum generally, in part by borrowing from ADR pedagogy and research. It is not so much that we believe all law students need to learn more about negotiation, mediation, and arbitration, although we do believe this, but rather that we believe all law students should learn more about how to be an effective lawyer by using the variety of processes that are commonly used in practice.

It is important to do a better job of teaching lawyering, and approaches used in ADR courses can be very useful to this endeavor. In addition, many ADR faculty have special insights into curriculum reform, as ADR instruction is a relatively recent curriculum reform itself. Of course, other faculty, especially clinical faculty, have invested great effort into curriculum reform, and law schools should take advantage of their experience and insights as well.

Our proposed approach does not require that every faculty member increase the range of lawyering issues covered in their courses, nor that faculty who do modify their courses make radical changes. Moreover, this approach could be effective only if faculty participate because they want to do so, not because they are required to do so. Faculty who respond purely to authoritative mandates are not likely to invest much effort or be very effective. Faculty who are motivated to modify their instruction are likely to do so only if it does not require substantial additional efforts and does not

aba/search.php. Additional information about the survey can be found at <http://www.abanet.org/dispute/directory.html>.

¹⁰² See Kenneth N. Klee, *Teaching Transactional Law*, 27 CAL. BANKR. J. 295, 300-08 (2004).

create an unacceptable tradeoff of gains from new material as compared with any loss of coverage of existing material. Thus, we offer the following recommendations with the expectation that interested faculty would adopt them selectively, as makes sense given their knowledge, skills, interests, and ideas about how our proposed approach might enhance their instruction. Of course, support by administrators and adoption of school-wide initiatives can be very helpful, but they are not essential for individual faculty to take these steps.¹⁰³ Moreover, while some faculty can successfully follow our suggestions without consulting knowledgeable colleagues or learning new material, obviously such consultation and learning can increase instructors' effectiveness. Schools and national organizations can develop materials to help instructors who would like help in implementing these ideas.¹⁰⁴

1. Use Existing Teaching Materials More Creatively in Doctrinal Courses

It is especially important for students to learn about a wide range of lawyering elements in doctrinal courses. In the culture of most law schools,

¹⁰³ In this symposium, Prof. Michael Moffitt developed a useful typology of four visions (or approaches) to ADR education, with evocative titles. A "germ" approach involves incorporating material into existing courses. See Moffitt, *supra* note 81, at 27, 68–71. This is the simplest approach and requires no coordination with other faculty or administrators. The other three approaches require school-wide decisions. Some schools may prefer to treat ADR as "vitamins," requiring them in "small, stand-alone" doses. *Id.* at 26–27, 59–63. Others use a "salt" approach, sprinkling it throughout the curriculum but not offering it as stand-alone courses. *Id.* at 27, 63–67. Schools with the greatest aspirations for ADR instruction develop programs that are "islands" of substantial specialized effort. *Id.* at 26, 54–58. Recognizing that some schools may not prefer one of the latter approaches, our proposals are oriented to faculty who want to use the "germ" approach. Schools that want to use one of the other approaches can combine various proposals to fit their situations.

Jess Krannich and his co-authors provide a similar critique of legal education as we do but recommend that law schools undertake an integrated and comprehensive reform of their curricula. See Jess M. Krannich et al., *Beyond "Thinking Like a Lawyer" and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 DENV. U. L. REV. 381 (2009). While we are sympathetic to their ideals, our experience is that such reform is difficult even under the best of circumstances (i.e., at Moffitt's "island" schools) and that most law schools do not have the interest and resources to undertake such efforts. Thus our proposals are more modest, and instead of recommending a comprehensive model for all schools, we recommend that faculty and schools tailor reforms based on the particular opportunities (and barriers) that they encounter.

¹⁰⁴ See *infra* Part IV.A.4.

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many students (and faculty) view the doctrinal courses as “real law”, unlike some other courses. Thus, messages about the importance of the full range of lawyering skills may be conveyed more effectively to some students if given in different types of courses, especially those that are seen as involving “real law”.

Considering that it can be very time-consuming to develop new teaching materials, faculty who would like to provide a more complete image of lawyering may start by using existing teaching materials more creatively. The gist of teaching lawyering is to encourage students to think not only as a judge, but also as a client and an attorney.¹⁰⁵ Judges are primarily concerned about the correct, and necessarily retrospective, application of the law to the facts demonstrated by the evidence in a case. Clients and attorneys view cases prospectively, considering not only the likelihood of success in adjudication, but also practical issues such as the costs and benefits of taking particular steps in the matter. Many ADR faculty who also teach doctrinal courses have learned how to incorporate broader lawyering perspectives into their courses without creating new teaching materials, and other law professors can do so as well. As discussed below, faculty can do this by focusing on parties’ and attorneys’ perspectives as well as considering alternative conflict prevention and resolution alternatives.

Anyone with some imagination can use traditional cases to discuss the parties’ perspectives.¹⁰⁶ Even if the case itself provides little or no information regarding the parties, faculty can ask students to use their own life experience to imagine what the parties might have been going through. One of us uses this approach in civil procedure to discuss a case, *Band’s Refuse Removal, Inc. v. Borough of Fair Lawn*,¹⁰⁷ that the casebook authors intended to be used to teach only about the nature of the adversary system.¹⁰⁸

¹⁰⁵ Although professors often say that law school teaches students to “think like a lawyer,” the Carnegie report finds that the over-reliance on training in legal analysis teaches law students to “think like a judge.” See SULLIVAN ET AL., *supra* note 16, at 11.

¹⁰⁶ Some instructors routinely require students to consider parties’ interests in analyzing cases. See, e.g., Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer’s Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL’Y 376, 392 n.77 (1997) (adding “I” for interests to issue, rule, analysis, and conclusion, structure, changing it to “IRACI”); Kate O’Neill, *Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Writing Course*, 50 FLA. L.REV. 709, 715–17 (1998) (requiring students in legal writing course to include parties’ interests when briefing cases).

¹⁰⁷ *Band’s Refuse Removal, Inc. v. Borough of Fair Lawn*, 163 A.2d 465 (N.J. 1960).

¹⁰⁸ The case appears in a standard civil procedure text. RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* (5th ed. 2009).

The case involves a dispute between two garbage companies and a township. The professor asks the students to think about such issues as why one garbage company might have brought a lawsuit, what its options might have been, why the second garbage company sought to intervene in the suit and what its options might have been, why the township behaved as it did, etc. Students are also asked to play the role of attorney for one of the companies and engage in a counseling session with the company president (played by the professor).¹⁰⁹ One can engage in a similar exercise with virtually any case in any casebook.

While, of course, no professor will want to ask students to analyze party interests and choices in all cases, this can be done multiple times during the semester to help students understand particular practical considerations present in a given subject area. For example, students in an employment law course can be asked to think about employees' need to obtain other employment or how employment problems might affect employees' mental health or relationships with their families. In the same course, students can also be asked to think about how litigation might affect companies' productivity or reputation. Similarly, students in a transactional course can be asked to think about the parties' business motivations and why they might have structured a transaction the way they did or how they might have structured it differently.

Many texts or teaching manuals include notes following the principal cases that can be used to analyze various lawyering issues from the parties' perspectives. Professors can also obtain information useful for such exercises from outside materials such as the Foundation Press series focused on the real stories behind various famous cases.¹¹⁰ Indeed, some existing law texts already include at least some aspects of lawyering perspectives.¹¹¹ In many fields, some authors have chosen to teach their doctrinal subject using a

¹⁰⁹ For further discussion of this exercise and other techniques used to teach civil procedure from an ADR perspective see Sternlight, *supra* note 72.

¹¹⁰ See Foundation Press Law Stories Series, available at <http://www.westacademic.com/Professors/> (follow "Foundation Press" hyperlink; then follow "Product Lines" hyperlink; then follow "Law Stories Series" hyperlink) (listing all the books in this series).

¹¹¹ *E.g.*, DAVID CRUMP, DAVID S. CAUDILL & DAVID HRICIK, PROPERTY: CASES, DOCUMENTS, AND LAWYERING STRATEGIES (2d ed. 2008); GEORGE FISHER, EVIDENCE (2d ed. 2008); R. WILSON FREYERMUTH, ET AL., PROPERTY AND LAWYERING (2d ed. 2006); LISA G. LERMAN AND PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW (2d ed. 2008); RONALD J. MANN, PAYMENT SYSTEMS AND OTHER FINANCIAL TRANSACTIONS: CASES, MATERIALS, AND PROBLEMS (4th ed. 2008).

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problem-oriented approach.¹¹² Problem-oriented texts typically present students with factual summaries of a problem and then ask them to apply the law they are learning to analyze that problem.¹¹³ This approach is an advance over the pure case method, in our opinion, because the problem approach at least requires students to apply the law to the facts from the perspective of a lawyer rather than a judge (or law professor). This method still allows for Socratic questioning about how students might act differently if the facts were changed in particular ways.

Thus, using various existing materials, faculty can present problems, defined from a client's perspective, and ask students to consider what the client might want from the lawyer and how lawyers might help solve clients' problems. They can ask students to consider how conflicts might have been avoided through better planning or drafting, and they can ask why one approach or another might be preferable to resolve a dispute that has arisen.

In addition to focusing on parties' perspectives, faculty may ask students to examine problems from the lawyers' perspective. Although students in doctrinal courses are often asked to act as lawyers, they normally do so in the context of making arguments to courts rather than dealing with clients or with the opposing party or counsel.

Using virtually any case in a casebook, faculty can ask students to consider how attorneys should interview and advise clients, decide whether to take a particular case, and make different decisions in handling the case. Again, while faculty would not want to raise such questions with respect to every case, they can do so in any course to illustrate issues particular to that

¹¹² For general discussion of the problem-oriented approach to teaching, see Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 WIS. INT'L L.J. 295, 318–20 (2006); Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992); Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597 (2007) (urging law schools to use a case or problem method similar to that used in business schools).

¹¹³ See, e.g., THOMAS D. CRANDALL & DOUGLAS J. WHALEY, *CASES, PROBLEMS, AND MATERIALS ON CONTRACTS* (Aspen 5th ed. 2008); FISHER, *supra* note 111; WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES* (3d ed. 2006); ANDREW L. KAUFMAN & DAVID B. WILKINS, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION* (5th ed. 2009); CHRISTINE A. KLEIN ET AL., *NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES* (2d ed. 2009); LYNN M. LOPUCKI ET AL., *COMMERCIAL TRANSACTIONS: A SYSTEMS APPROACH* (4th ed. 2009); LYNN M. LOPUCKI & ELIZABETH WARREN, *SECURED CREDIT: A SYSTEMS APPROACH* (Aspen 6th ed. 2009); MANN, *supra* note 111; FRANCIS J. MOOTZ ET AL., *COMMERCIAL CONTRACTING: SALES, LEASES, AND COMPUTER INFORMATION* (2d ed. 2008).

course. For example, a torts professor could use the famous *Palsgraf*¹¹⁴ case to discuss not only proximate cause, the traditional focus of the lesson, but also how a lawyer might go about deciding whether to take the case and what dispute resolution options the plaintiff might have considered or used. As most readers know, the case involved a bizarre accident. Long Island Railroad employees attempted to assist a passenger board a moving train. In the process of attempting to board, the passenger dropped a package of fireworks onto the tracks, causing an explosion.¹¹⁵ The explosion caused a large scale to fall, thereby injuring a bystander, Mrs. Palsgraf.¹¹⁶ Students might be asked to think about why certain persons were named as defendants, whether the plaintiff should have tried to settle before bringing the litigation, what the plaintiff might have sought from negotiation, and what defendants might have thought about in responding to the claim.

As noted above, faculty can use case problems from notes in casebooks or teaching manuals to provide a broader understanding of lawyering. The class could discuss issues relating to interviewing the client, explaining the relevant law to the client, investigating relevant facts, and negotiating and drafting agreements on the client's behalf. Such materials might also ask the student how to best represent the client not only in an appellate case, but also at trial, in an arbitration, in a mediation, or in a negotiation. Using these materials, students could better understand why the parties and lawyers took particular approaches and more fully examine whether the road taken was the best road possible. They can do this analysis not only from a retrospective perspective but also prospectively—considering how the situation might have looked as the case was proceeding and how they might have acted at various points in the case.

A third perspective that faculty might draw from existing cases, with relatively little effort, would look at how conflicts might be prevented in the first place. In an employment law course, faculty could use a particular case to help students take the perspective of counsel to the company. How might the company have set up its internal rules and procedures to prevent the conflict from arising? In an intellectual property course, how might either plaintiff or defendant have behaved differently, prior to the occurrence of the dispute giving rise to the lawsuit, to try to prevent the dispute or resolve it quickly? For example, rather than litigating a patent infringement suit, the parties could negotiate a licensing agreement. Increasingly companies are

¹¹⁴ *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928).

¹¹⁵ *Id.*

¹¹⁶ For additional background on the case, see WILLIAM H. MANZ, *THE PALSGRAF CASE: COURTS, LAW AND SOCIETY IN 1920S NEW YORK* (2005).

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using approaches such as partnering¹¹⁷ and drafting pre-dispute mediation agreements¹¹⁸ to try to minimize or avoid conflicts that might occur. Faculty can easily discuss these ideas in standard doctrinal courses. Again, this need not be done for every case but faculty can select a limited number of cases throughout a course where this discussion would be helpful.

2. Use or Develop New Teaching Materials

The availability of teaching materials is critical to most faculty members' choice of how to teach a course. Because faculty have easy access to numerous casebooks that primarily contain appellate cases, it is natural that most faculty focus on appellate cases, rather than other materials. ADR texts illustrate the wide range of possible teaching materials in addition to appellate cases.¹¹⁹ For example, to highlight key issues many ADR texts include extensive excerpts of books and law review articles. Some doctrinal texts are already including materials that go way beyond cases, including songs, poems, and pictures.¹²⁰

Even where the textbook authors are not so creative, faculty teaching doctrinal courses could readily identify and assign appropriate language from

¹¹⁷ Bette J. Roth et al., *Partnering—New Dimensions in Dispute Prevention and Resolution*, 1 ADR PRAC. GUIDE § 39:2 (2009).

¹¹⁸ E.g., Lucy V. Katz, *Getting to the Table, Kicking and Screaming: Drafting an Enforceable Mediation Provision*, 26 ALT. TO THE HIGH COST OF LITIG. 183 (2008) (explaining that companies are increasingly including mediation clauses in their contracts and that courts are increasingly enforcing such clauses).

¹¹⁹ Part of the reason that a large proportion of the material in many ADR texts does not consist of appellate cases is that such cases are not the primary authorities for much of the material in these courses.

¹²⁰ See, e.g., FISHER, *supra* note 109 (including poems, stories, and pictures); AMY H. KASTELY, DEBORAH WAIRE POST, & NANCY OTA, *CONTRACTING LAW* (4th ed. 2006) (including cultural and historical materials); JOHN G. SPRANKLING & RAYMOND R. COLETTA, *Preface to PROPERTY: A CONTEMPORARY APPROACH* (2009):

Property is a visual subject. You will often understand the material better if you can see a photograph, a map, or a diagram. Accordingly, there are almost 200 points in the ebook where you can click into a visual resource. It also contains a number of audio clips, ranging from popular songs to oral arguments before the Supreme Court. Finally, the ebook is hyperlinked to cases, statutes, law review articles, and other resources in Westlaw, so you can easily read the full text of all cited materials online. . . .

Id. at v; see also West's Interactive Casebook Series, available at <http://interactivecasebook.com/default.aspx> (including materials that go far beyond the basic case).

law reviews or other outside sources that similarly focus on important practice issues. Faculty typically keep up with the law review literature in their subjects, and can easily create excerpts for students to read. Faculty can also add journalistic and academic accounts of negotiations, mediations, arbitration, or litigation that either did take place, or might have taken place, in particular disputes. In addition, the Foundation Press “Stories” series publishes background information on famous cases from a variety of areas including administrative law, bankruptcy, business tax, civil procedure, constitutional law, and contracts.¹²¹ Such accounts from a lawyering perspective provide richer background on the disputants and lawyers involved in particular cases. For example, a torts class might discuss the famous McDonald’s hot coffee case.¹²² In that case a seventy-nine year-old woman was seriously burned when opening a cup of very hot coffee. After McDonald’s rejected her demand of about \$20,000 to reimburse her medical and other expenses she won an award at trial of \$160,000 in compensatory damages and \$2.7 million in punitive damages.¹²³ Cases like these not only illustrate legal rules but also decisionmaking by parties and lawyers as well as negotiation and legal culture.

Books or movies that go behind the scenes of decided cases and teach students what both the clients and lawyers were thinking can be very useful. Some such books already exist. Civil procedure faculty, for example, often have students read books such as *The Buffalo Creek Disaster*,¹²⁴ *A Civil Action*,¹²⁵ or *Storming the Court*,¹²⁶ so that they better understand clients’ desires, dilemmas, and suffering, as well as lawyers’ strategic choices. The

¹²¹ See, e.g., Foundation Press, *supra* note 110 (listing all the books in this series).

¹²² *Liebeck v. McDonald’s Rest., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994), *vacated*, No. CV-93-02419, 1994 WL 16777704 (N.M. Dist. Nov. 28, 1994).

¹²³ See Michael McCann et al., *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 119–29 (2001). The trial court reduced the punitive damage award to \$480,000. *Id.* at 130.

¹²⁴ GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (Vintage Books 2008).

¹²⁵ JONATHAN HARR, *A CIVIL ACTION* (Vintage Books 1996). Another book that might be used is BARRY WERTH, *DAMAGES: ONE FAMILY’S LEGAL STRUGGLES IN THE WORLD OF MEDICINE* (Berkley Books 1999). The University of Missouri Law School taught an entire course focusing on the case described in this book. The course was team-taught by various members of the faculty who examined aspects of the case relevant to their areas of expertise. The instructors wrote a series of articles published in a symposium. See Melody Richardson Daily et al., *Damages: Using a Case Study to Teach Law, Lawyering, and Dispute Resolution*, 2004 J. DISP. RESOL. 1.

¹²⁶ BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* (2006).

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pleadings in these cases have been collected¹²⁷ so that students can see how real pleadings affect real disputants. Also, faculty can use popular movies, not only to illustrate points in their courses, but also to help students better understand the real people and pain underlying disputes.¹²⁸ Faculty teaching an intellectual property course, for example, could assign students to watch *Flash of Genius*, which is based on the true story of the legal battle by a professor/inventor against Ford Motor Company regarding invention of the intermittent windshield wiper.¹²⁹ Students would learn about the high cost of battling a company like Ford, and about how the inventor's attempt to protect his patent affected him and his family. Although most movies distributed for entertainment use some artistic license (often a lot), faculty can note aspects of the movies that are realistic and those that are not.

In addition to using movies created for entertainment, faculty can use instructional videos illustrating various aspects of lawyering. Some ADR textbooks include accompanying videos to show students how to approach particular problems.¹³⁰ Professors can also create their own videos. For example, Hamline Professor James Coben and the Minnesota Bar Association created a set of short videos based on forty mediation cases.¹³¹ These videos, based on decided cases, provide students with an opportunity to get a better feeling for the real people and issues behind the reported cases. Creative professors teaching doctrinal courses might use a similar approach to illustrate the lawyering underlying significant cases in their area.

¹²⁷ A selection of the pleadings used in *Anderson v. Cryovac Inc.*, the case described in *A Civil Action*, have been collected and published in a separate book. LEWIS A. GROSSMAN & ROBERT G. VAUGHN, *A DOCUMENTARY COMPANION TO A CIVIL ACTION* (4th ed. 2008). Pleadings from the litigation described in *Storming the Court* are collected in BRANDT GOLDSTEIN ET AL., *A DOCUMENTARY COMPANION TO STORMING THE COURT* (2009). Documents related to the Buffalo Creek Disaster have been handed down from professor to professor over the years, and videos relating to that book have been produced by Professor Marilyn Berger at Seattle University School of Law.

¹²⁸ MARION G. CRAIN, PAULINE T. KIM & MICHAEL L. SELMI, *WORKLAW: CASES AND MATERIALS—TEACHER'S MANUAL* 102–03 (2005) (discussing use of movie *Norma Rae*); GEORGE FISHER, *EVIDENCE—TEACHER'S MANUAL* (2009) (suggesting use of various videos and documentaries).

¹²⁹ *FLASH OF GENIUS* (Universal Studios 2009).

¹³⁰ For example, the Frankel and Stark mediation text is centered on substantial video segments, created for the text, that demonstrate alternative approaches to mediation. DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT* (2008).

¹³¹ Hamline University School of Law, Case Law Videos, <http://law.hamline.edu/adr/mediation-case-law-videos.html>.

Faculty can use additional types of materials and techniques commonly used in ADR courses. In addition to presenting case scenarios for discussion, students can do case simulations, playing the roles of lawyers, clients, mediators, and judges. Students can enact scenes involving client interviewing and counseling, negotiation, mediation, and court arguments. Faculty can assign students to do these exercises in class or outside of class. Several institutions have either produced role-plays and simulations or collected such materials from others, and then made the materials available to other faculty at relatively low cost.¹³² Similarly, several entities have hosted teaching conferences at which faculty in the field can share their innovative approaches with one another.¹³³

Guest speakers can be used to enhance traditional teaching materials. Such guests can include attorneys, judges, mediators, arbitrators, former clients, and others who might be able to give insights into the real people and real stories that underlie disputes or transactions. Law students can learn from such speakers why transactions were structured in a particular way, what clients' goals and interests may have been, what options lawyers considered in representing their clients, and how various sorts of neutrals think about resolving disputes.

¹³² The Harvard Program on Negotiation prepares and sells numerous role plays related to negotiation and mediation. *See* Program on Negotiation at Harvard Law School Clearinghouse, Role Simulations, http://www.pon.org/catalog/index.php?manufacturers_id=14 (last visited Oct. 20, 2009). Willamette University College of Law provides a comprehensive system where users may submit their own role-plays and view the submissions of others. *See* Willamette College of Law, CDR Simulation Bank, <http://www.willamette.edu/wucl/cdr/simbank/login.cgi?action=newsim> (last visited Oct. 21, 2009). Northwestern University also sells role-plays. *See* Kellogg School of Management, Dispute Resolution Research Center, Teaching Materials, <http://www.kellogg.northwestern.edu/drrc/teaching/index.htm> (last visited Oct. 21, 2009). The AALS ADR Section website includes some teaching materials as well. *See* Alternative Dispute Resolution Section of the Association of American Law Schools, Teaching Materials, http://www.law.missouri.edu/aalsadr/teaching_materials.htm (last visited Oct. 21, 2009).

¹³³ The ABA Section on Dispute Resolution and the AALS Section on Alternative Dispute Resolution jointly sponsor an annual Legal Educator's Colloquium as part of the annual conference of the Section on Dispute Resolution. This half-day or full-day event exposes faculty or future faculty, to the latest innovations in teaching, and typically provides attendees with useful handouts as well. *See, e.g.,* Legal Educators Colloquium, A.B.A. Section of Dispute Resolution 11th Annual Spring Conference (Apr. 15–18, 2009), *available at* <http://www.abanet.org/dispute/spring2009/colloquium.html>. Such teaching conferences have also been sponsored by particular law schools. *See, e.g.,* Program on Negotiation at Harvard, Events, *available at* <http://www.pon.harvard.edu/category/events/>.

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ADR courses may provide useful models for how to integrate interdisciplinary materials effectively.¹³⁴ Most, if not all, of the major ADR casebooks draw on multiple disciplines including psychology, sociology, economics, and communication theory.¹³⁵ Students learn about such varied matters as memory, cognition, biases, persuasion, groupthink, and probability. These subjects will be useful not only as students advise future clients about ADR methods, but also as they counsel clients about a wide variety of issues pertaining to their legal situation.

Deans, donors, bar associations, or others could incentivize faculty to create more such innovative books or films by offering them course relief, financial rewards, praise, or other benefits in return for creating books or making videos that take a broader lawyering approach to the teaching of particular materials. In the ADR world, such incentives have led more faculty to create and distribute interesting pedagogical approaches,¹³⁶ and

¹³⁴ Writing twenty-five years ago, Professor Albert M. Sacks identified the synergy between the increased focus on ADR and the increased focus on interdisciplinary materials in law school. *See* Sacks, *supra* note 23, at 241. He explained that other disciplines are valuable in many ways, but perhaps particularly so for their ability to focus lawyers on the “human interaction” aspect of legal practice. *Id.*

¹³⁵ *See, e.g.*, JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 121–25 (2d ed. 2006) (discussing communication skills); RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 31–90 (2d ed. 2009) (discussing economic and psychological insights pertaining to negotiation); CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 136–77, 191–202 (2005) (exploring psychology and communications theory relevant to negotiation); ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 133–45, 182–213 (4th ed. 2006) (discussing game theory and psychology of fairness, psychological and social aspects of bargaining, and stereotyping issues); LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 2–4, 140–51, 175–84, 199–202, 206–07 (4th ed. 2009) (discussing conflict theory, questioning and listening techniques, economic and psychological aspects of negotiation); E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, *MEDIATION AND NEGOTIATION: REACHING AGREEMENT IN LAW AND BUSINESS* 71–119 (Lexis 2d rev. ed. 2007) (discussing rational choice theory, decision biases, cognitive dissonance, agency theory, anthropology, and sociology).

¹³⁶ For example, Professor Riskin’s early work at the University of Missouri was supported by grants from the Department of Education and elsewhere, and such grants also enabled Riskin to provide small stipends to faculty who drafted ADR exercises for inclusion in required first-year courses. *See* Riskin & Westbrook, *supra* note 75, at 511 n.17. In later years the Hewlett Foundation provided grants to numerous schools and programs to support ADR initiatives and pedagogical innovation. *See, e.g.*, ANDREA KUPFER SCHNEIDER & CHRISTOPHER HONEYMAN, *THE NEGOTIATOR’S FIELDBOOK* xxi (2006) (using Hewlett Foundation grant to fund publication of innovative articles in field of negotiation). Such incentives need not be monetary. The Legal Educator’s Colloquium, a joint venture of the ABA Dispute Resolution Section and the AALS

presumably the same kinds of incentives would work in the non-ADR world as well.

3. *Increase Coordination of Doctrinal, Litigation, Transactional, and ADR Instruction*

Faculty who want to provide a more integrated legal education that better prepares law students for the real world of lawyering can increase the impact of their efforts by coordinating with their law school colleagues. Of course, faculty can do this with colleagues who teach “neighboring” courses, as many commonly do already.¹³⁷ Beyond that, faculty may want to consult with colleagues teaching courses that do not share obvious boundaries. This may be particularly helpful for faculty teaching courses in different categories of doctrinal, litigation, transactional, and ADR courses. For example, faculty teaching pretrial litigation and mediation might coordinate in doing simulations where the students in the pretrial course act as lawyers in mediation and the mediation students act as mediators.¹³⁸ Or, faculty teaching negotiation could offer to help students in a predominantly litigation clinic think about how to approach a possible settlement. Where there is potential overlap of material, colleagues may consult with each other or ask each other to give guest lectures in each others’ courses. For example, faculty teaching contracts and negotiation could help in each others’ courses. A contracts professor could consult or lecture about enforcement issues relating to negotiation¹³⁹ for a negotiation course. Those of us who teach ADR should consider the ways that ADR overlaps with litigation, doctrine, and transactional work in the real world, and should seek assistance from professors in those fields where appropriate. Conversely, a faculty member teaching negotiation could help a contracts professor present practical issues in negotiating contracts.

Dispute Resolution Section, invites professors to make presentations on their innovative pedagogical approaches and this publicity likely inspires further creativity on the part of professors. See, e.g., Colloquium, *ADR: Building Bridges to a Better Society*, A.B.A. SEC. DISP. RESOL. (Apr. 15–18, 2009), available at <http://www.abanet.org/dispute/spring2009/DRSP09-ConfBrochure.pdf>.

¹³⁷ See *supra* Part I.

¹³⁸ Similarly, family law and mediation faculty may do joint exercises considering the fact that mediation is widely used in family law cases.

¹³⁹ See, e.g., RUSSELL KOROBKIN ET AL., *The Law of Bargaining*, 87 MARQ. L. REV. 839 (2004), reprinted in SCHNEIDER & HONEYMAN, *supra* note 136, at 183 (describing legal doctrines relating to misrepresentation in negotiation).

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More broadly, groups of faculty could consult with each other to coordinate coverage and consider how they might help enhance each others' instruction. Many law schools have groups of faculty teaching legal writing, clinical courses, and ADR, and faculty might consult with each other on a group level.

As noted above, to be successful, this kind of coordination requires voluntary interest by participating faculty members.¹⁴⁰ Faculty need to believe that these efforts would make a positive difference, and that any changes would be feasible and not unreasonably burdensome considering their time constraints.

4. Provide Technical Assistance to Increase Integration of ADR Instruction in Doctrinal, Litigation, and Transactional Courses

Many ADR faculty believe that their work makes an important contribution to law students' education about the broad range of skills and knowledge described in this Article. Many believe that it would be desirable to increase the amount of ADR education in law school, but also recognize the barriers to curricular reform. Given these constraints, the most promising strategy would include integrating ADR instruction in other courses as described above.¹⁴¹ To promote this strategy, ADR faculty could offer themselves as resources for faculty interested in integrating ADR in their non-ADR courses. ADR faculty can provide suggestions for readings, class exercises, videotapes, and the like. They can offer to provide guest lecturers or identify practitioners who would be suitable. They can also encourage colleagues to coordinate with others on their faculty.¹⁴²

The ABA Section of Dispute Resolution and/or the ADR Section of the Association of American Law Schools could undertake a technical assistance project to assist ADR faculty who may need help in playing this facilitating role with their colleagues. The ABA Section of Dispute Resolution has sponsored a well-attended Legal Educators' Colloquium in connection with the Section's annual conference, and this Colloquium could provide a useful forum for initiating and developing such a project.¹⁴³ These groups could provide centralized efforts to develop ideas and materials and take actions best done on a centralized level. For example, such a project could develop

¹⁴⁰ See *supra* Part I.

¹⁴¹ This is not to suggest that integrating ADR into other courses should be the exclusive strategy. For additional policy options, see *infra* Parts IV.B–F.

¹⁴² See *supra* Part IV.A.3.

¹⁴³ See A.B.A. SEC. DISP. RESOL., *supra* note 136, at 14.

guides with ideas that could be used in doctrinal courses generally, as well as ideas specific to particular subjects. They might develop training modules for ADR faculty to help colleagues at their schools to incorporate ideas into their courses. They might also make a systematic effort to encourage casebook authors to incorporate helpful materials into their next editions. In undertaking such a project, ADR faculty should presumably get input from instructors teaching other kinds of courses about what types of assistance would be most useful.

B. Increase ADR Instruction

ADR courses can play an extremely important role in the reform of law school pedagogy.¹⁴⁴ By their very nature, ADR materials shift law students' focus away from appellate cases and toward some of the many other aspects of law practice. A typical ADR course, for example, opens by asking students to consider the many disputes or potential disputes that never are filed in court, and much less go to trial or get appealed but might still involve lawyers.¹⁴⁵ Many ADR materials ask students to consider how they would counsel their clients. Such courses help students focus on the clients' interests instead of, or in addition to, their litigation positions. In teaching about negotiation and mediation, for example, ADR courses emphasize how a combination of such skills as listening, demonstrating empathy, building rapport, persuasion, fact gathering, factual presentation, and legal research and reasoning can all be drawn together to help clients achieve desired results.

Learning to use legal skills requires some practice and the pedagogy in many ADR courses focuses particularly on developing students' skills. Without experiential components, teaching students to practice law would be like teaching someone to ride a bike solely by explaining the laws of physics and describing how to pedal. ADR courses typically help students learn the mindset and behaviors needed to practice law. Of course, law school curricula do include some experiential courses, such as clinical and pretrial and trial practice courses, but students would benefit from additional

¹⁴⁴ The importance of teaching ADR has been recognized by the ABA, task forces on legal education, and a Supreme Court Chief Justice. See Robert B. Moberly, *Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges*, 50 FLA. L. REV. 583, 585 (1998).

¹⁴⁵ A common reading is Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81) (illustrating the transformation of grievances into disputes, which may or may not involve lawyers or lawsuits).

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experiential opportunities. ADR courses often require students to write journals and research papers as well, thereby enhancing their students' writing skills.

As noted above, ADR and other skills courses often are more expensive for law schools because they often limit class sizes to enable faculty to interact more closely with students. There are at least two possible strategies for law schools to deal with resource constraints. Some schools rely heavily on adjunct faculty to teach ADR courses, which substantially reduces the cost of instruction. This is feasible when a school is located near an area of active ADR practice, such as many major urban areas. Although there is value in offering courses using tenure-track faculty, who are likely to have greater understanding of ADR theory (and many have ADR practice experience as well), some law schools will be able to offer substantial ADR instruction only by hiring adjunct faculty. Because of these constraints, to substantially increase ADR education in many schools, it may be necessary to incorporate it into other courses, especially doctrinal courses, as described above.

C. Provide Students with Resources to Create Portfolios Demonstrating Lawyering Skills

One way to change faculty and student attitudes towards curricular reform would be to offer students a new means to demonstrate their proficiency in lawyering. The MacCrate Report developed a "statement of fundamental lawyering skills and professional values,"¹⁴⁶ and suggested that students could use this statement as an aid to better their own legal education.¹⁴⁷ Following up on this idea, some have suggested that students be given a chance to develop a portfolio to demonstrate their lawyering

¹⁴⁶ MacCrate Report, *supra* note 32, at 135.

¹⁴⁷ It stated:

As noted . . . many law students are passive consumers of legal education: [t]hey lack an adequate understanding of the requirements for competent practice. . . . If the Statement of Skills and Values is distributed to all law students at the time they enter law school, students will begin their legal education with a clearer sense of the importance of acquiring skills and values in the course of professional development. Students will be encouraged to seek out opportunities to develop these skills and values while they are in law school. . . .

Id. at 127.

proficiency to the outside world, including potential employers.¹⁴⁸ The Thomas M. Cooley Law School has been a leader in this program, setting up a voluntary electronic portfolio that students can use to both monitor and demonstrate their accomplishments.¹⁴⁹ Making portfolios easy and appealing for students to use would make them more accountable for their own education. Assuming that the portfolio includes skills such as problem solving, negotiation, and fact gathering, law students will begin to seek more instruction in these areas.

D. Expand Law School Admissions Criteria Beyond Analytical Abilities

Although this Article focuses primarily on law school curricula, generally taking as a given the type of law student currently admitted to law school, characteristics of students admitted are also tremendously relevant to the question of what type of lawyers will be produced by law schools.¹⁵⁰ This point is illustrated by an extremely impressive multi-part empirical study conducted by Professors Shultz and Zedeck, which was funded by the Law School Admissions Council.¹⁵¹ After first identifying twenty-six factors that lawyers, law students, judges, and clients found were indicators of effective lawyering, the study examined whether or how Law School Admission Test (LSAT) scores, undergraduate grade-point averages (UGPA), and other psychological and situational exams might predict effective lawyering. To measure lawyering effectiveness, the researchers collected data on lawyers' self-assessments of these twenty-six factors as well as assessments of these factors by two supervisors and two peers.¹⁵² The study found that while the LSAT and UGPA were strong predictors of ability to engage in legal analysis, legal research, and writing, those indicators were not useful in predicting most of the other effectiveness factors.¹⁵³ By contrast, tests

¹⁴⁸ For a discussion of the concept of the professionalism portfolio see Deborah Jones Merritt, *Pedagogy, Progress, and Portfolios*, 25 OHIO ST. J. DISP. RESOL. 7 (2010); Heather Spielmaker & Amy Timmer, *The Professionalism Portfolio*, in REFLECTIONS OF A LAWYER'S SOUL 291 (Amy Timmer & Nelson Miller eds., 2008).

¹⁴⁹ Thomas M. Cooley Law School, Professionalism Portfolio, available at http://www.cooley.edu/ethics/programs_professionalism.html#portfolio.

¹⁵⁰ See Marjorie M. Shultz & Sheldon Zedeck, *Final Report-Identification, Development and Validation of Predictors for Successful Lawyering* (Jan. 30, 2009), available at <http://www.ssrn.com> (search "1353554").

¹⁵¹ *Id.* at 2.

¹⁵² See *id.* at 24–27, 40–42.

¹⁵³ See *id.* at 53–55.

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measuring biographical background and situational judgment factors were good predictors of almost all the effectiveness factors.¹⁵⁴

In reviewing applications to law school, most schools rely heavily on the LSAT and UGPA as admission criteria. These measures focus on analytical abilities, paralleling the focus in most law school curricula. Just as the curricula should expand to include a broader range of skills and knowledge,¹⁵⁵ so should the admissions criteria. Of course, law schools will continue to use the LSAT and UGPA, which are appropriate to screen out applicants with low scores and to accept students with especially high scores. For applicants in an intermediate range, law schools currently consider a range of other factors such as extra-curricular activities in college. In considering such other factors, law schools should explicitly examine factors relevant to the wide range of skills and knowledge that lawyers need. This is particularly appropriate considering that law schools cannot teach everything that lawyers need to practice, and must therefore rely, to some extent, on pre-existing knowledge and experience. One fairly easy approach might be for law schools to list essential lawyering skills (such as those set forth by the MacCrate Report),¹⁵⁶ and ask applicants to explain if they already have such skills, how they acquired them, or how they might demonstrate possession of such skills.

*E. Advocate Revision of ABA Accreditation Standards to Require Law Schools to Teach ADR*¹⁵⁷

The changes discussed above are feasible today, but many will not happen until there is a change in the incentive structure for law schools and law students. ADR faculty have learned that while our curricular proposals seem logical, at least to us, sometimes there is still resistance by faculty and students. One way to change law schools' incentives would be to change the law school accreditation standards.

The American Bar Association Standards for Approval of Law Schools now generally require instruction in professional skills but do not specifically require law schools to provide ADR instruction. Standard 302(a)(4) states that "[a] law school shall require that each student receive substantial

¹⁵⁴ See *id.* at 57–61.

¹⁵⁵ See *supra* Part II.C.5.

¹⁵⁶ See *supra* Part II.B.

¹⁵⁷ The general idea for this part was derived from a presentation given by University of Oregon School of Law Professor Michael Moffitt at the University of Missouri School of Law. See Moffitt, *supra* note 81.

instruction in . . . professional skills generally regarded as necessary for effective and responsible participation in the legal profession.”¹⁵⁸ Interpretation 302-2 states “[t]rial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are among the areas of instruction in professional skills that fulfill Standard 302 (a)(4).”¹⁵⁹

It is commendable that the ABA Standard includes ADR as one of the subjects that fulfills the professional skills requirement, but it would be better if the standard specifically required each law school to include substantial ADR instruction. This would be appropriate considering that virtually every practicing lawyer engages in negotiation, if not other ADR processes, and the legal curriculum is so heavily weighted toward litigation.¹⁶⁰ It is a disservice to law students, legal clients, and the general public to allow law students to graduate without some substantial introduction to ADR.

Obviously, there are many different ways that law schools could provide ADR instruction and if the ABA would revise its standard, each school would need to tailor its ADR instruction to its particular circumstances.¹⁶¹ For example, some schools might offer a required, stand-alone course focusing on ADR, others might require students to take one course from a menu of ADR courses, and yet others might incorporate substantial ADR components into other courses such as legal writing or civil procedure.¹⁶²

F. Work with Bar Examiners to Test More Litigation and ADR Skills

An additional way to change law school incentive structures is to change the nature of the bar exam.¹⁶³ Since law school administrators, faculty, and

¹⁵⁸ *Standards for Approval of Law Schools*, 2009 A.B.A. SEC. LEGAL EDUC. & ADMISSION B. § 3.02(a)(4), available at <http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf>.

¹⁵⁹ *Id.*, Interpretation 302-2.

¹⁶⁰ See *supra* Part II.

¹⁶¹ This would be consistent with Interpretation 302-2, which states, “[e]ach law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school.” *Standards for Approval*, *supra* note 158.

¹⁶² These would be the “vitamin” and “salt” strategies that Moffitt describes. See Moffitt, *supra* note 81.

¹⁶³ See Jay Folberg et al., *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. Rev. 343, 413 (1992).

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students worry a great deal about the bar passage rate, changes in bar exams are likely to prompt changes in attitudes and behavior about the curriculum. Specifically, if bar exams increase the proportion focused on lawyering, administrators and faculty would feel obliged to incorporate more such training in the core curriculum.

There are multiple ways bar exams could be changed to focus more on lawyering.¹⁶⁴ First, if bar examiners take seriously the critiques of law school, including the recent Carnegie Report, they would review the overall structure of the bar exam to focus on the many competencies that good lawyers need, rather than almost exclusively on analytical skills. The Multistate Performance Test (MPT)¹⁶⁵ already emphasizes at least some lawyering skills, in that it requires the test taker to provide advice to a client. The MPT could be revised to place even greater emphasis on interviewing and counseling skills, practical judgment, and problem solving. Bar examiners could also increase the percentage allocated to the MPT in the overall grading of the bar exam. Second, just as Wisconsin does not require graduates of Wisconsin law schools with a certain average to take the bar exam,¹⁶⁶ so other states might allow persons who had completed certain lawyering courses or an apprenticeship to be exempt from the bar exam. While some will no doubt view such an approach as too radical, others might find it to be quite appropriate. Third, law schools might encourage states to allow students to take the bar exam earlier in their law school career. Once students had passed the exam they would feel freer to take courses, such as those involving lawyering, that are not directly tested on the bar exam.¹⁶⁷

¹⁶⁴ See, e.g., Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002) (describing alternative methods to measure bar applicants' competence); Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 347 (2003) (proposing development of a "Public Service Alternative Bar Exam").

¹⁶⁵ See National Conference of Bar Examiners, Skills Tested by the MPT, available at <http://www.ncbex.org/multistate-tests/mpt/mpt-faqs/skills-tested/> (listing skills covered by the MPT).

¹⁶⁶ See Wisconsin Court System, Diploma Privilege 2009, available at <http://www.wicourts.gov/services/attorney/bardiploma.htm> (describing the Wisconsin "diploma privilege").

¹⁶⁷ This idea was suggested by Professor Kate Kruse at the University of Nevada-Las Vegas.

V. CONCLUSION

Law schools interested in improving the training of their students would do well to consider the varied contributions that ADR faculty and instruction could make to their overall curriculum. Obviously, every law school is different in the composition of its faculty and student body and in its goals and priorities, so there is no single formula that is appropriate for all schools. Rather, schools should assess their priorities and available resources to tailor their curricula to best serve their students and stakeholders generally.¹⁶⁸ The proposals in this Article are intended to be realistically achievable by most schools and faculty considering the formidable barriers to innovation in legal education.¹⁶⁹

For most schools, increasing focus on ADR¹⁷⁰ would help address some of the generally recognized limitations of many law schools' curricula.¹⁷¹ Even law schools with severe resource limitations can increase ADR instruction with little cost or disruption by incorporating ADR insights into existing courses,¹⁷² increasing coordination between doctrinal, litigation, and ADR instruction,¹⁷³ and operating websites so that students can produce "portfolios" demonstrating their efforts to develop lawyering skills.¹⁷⁴

¹⁶⁸ An official interpretive note of the ABA Standards for Approval of Law Schools states, "Each law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school." *Standards for Approval*, *supra* note 158. Law schools should consider a range of stakeholders which not only include students and their families, but also alumni, employers of law graduates, courts, and representatives of the general public (reflecting, in part, the concerns of future legal clients).

¹⁶⁹ See *supra* Part III. Some law schools and faculty have undertaken ambitious and promising reforms that go well beyond our modest proposals. See, e.g., SULLIVAN ET AL., *supra* note 16, at 34–43 (describing programs at the City University of New York and New York University); University of Washington, Legal Education at the Crossroads Ideas to Accomplishments: Sharing New Ideas for an Integrated Curriculum (Sept. 5-7, 2008) (program materials describing innovations at many law schools) (on file with authors). Our proposals are not intended to be the ideal model but rather ideas that could be adopted broadly.

¹⁷⁰ See *supra* Part I.

¹⁷¹ See *supra* Parts I., II.

¹⁷² See *supra* Part IV.A.1.

¹⁷³ See *supra* Part IV.A.3.

¹⁷⁴ See *supra* Part IV.C.

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Schools with greater ambitions and resources can invest in developing innovative materials¹⁷⁵ and adding ADR courses.¹⁷⁶

We encourage doctrinal faculty to make significant (though still modest) adjustments to incorporate some proposed changes even though making such adjustments may somewhat reduce the amount of doctrinal coverage. Although it is understandable that doctrinal faculty would want to impart the greatest amount of material possible within the time allotted, there are diminishing returns in trying to convey every last bit of doctrinal information in a course. Presumably covering such “bottom-of-the-list” topics would convey knowledge of certain legal rules but add little or no additional skill in legal analysis. Since law schools cannot teach students all the rules that they will need to know in any event, it is much more important to convey the skill of learning lawyering than it is to convey specific legal rules, especially those on the bottom of the list of any course. Thus, faculty should consider whether, as we strongly believe, the benefits of incorporating the approaches proposed in this Article would outweigh the loss of coverage.

ADR faculty can play critical roles in improving the quality of legal education in their schools by consulting with colleagues teaching other courses, and helping to coordinate faculty teaching different types of courses. To be most effective, ADR faculty should appreciate and coordinate with the material presented by other faculty, focused perhaps on litigation-skills, doctrine, or transactional work. The Law Schools Committee of the ABA Section of Dispute Resolution, and the ADR Section of the AALS, can provide technical assistance to ADR faculty to help perform these functions.¹⁷⁷ These groups can also work to revise accreditation standards to include ADR instruction.

Legal education reformers should focus not only on the curriculum, but also on the inputs and outputs of law school. Schools that include admission criteria relevant to lawyering skills can improve the educational interaction between students and produce students who are better able to practice law.¹⁷⁸ And if state bar examiners increase coverage of lawyering issues in bar examinations, law schools and law students will have strong motivation to pay more attention.¹⁷⁹

Obviously, the limited amount and narrow scope of ADR instruction are not the only problems with legal education. Increasing and better integrating

¹⁷⁵ See *supra* Part IV.A.2.

¹⁷⁶ See *supra* Part IV.B.

¹⁷⁷ See *supra* Part IV.A.4.

¹⁷⁸ See *supra* Part IV.D.

¹⁷⁹ See *supra* Part IV.E.

ADR instruction will not solve all the problems in legal education. Nonetheless, we do firmly believe that those law schools and faculty who do increase and further integrate ADR instruction will better prepare their students for the lawyering requirements of the real world today. In doing so they will both help future lawyers to serve clients more effectively and also improve lawyers' ability to help solve important social problems.